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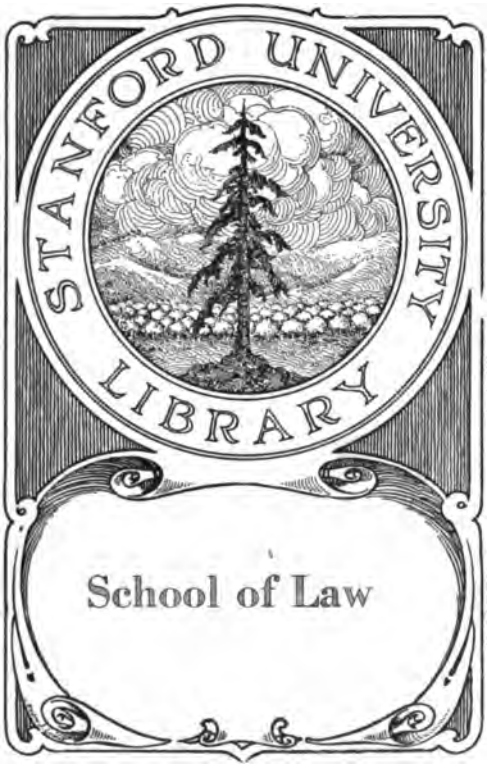
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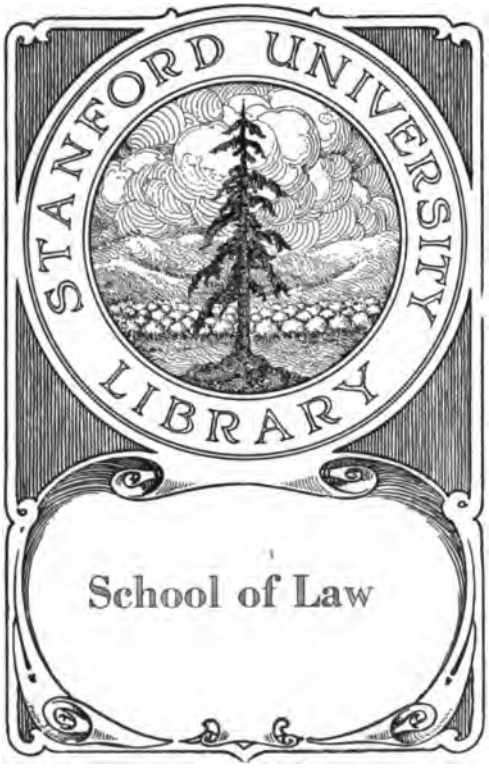
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DIARY FOR JANUARY.

1. Mon.. *Circumcision.* County Court Term beg. Heir and Devisee Sittings begin. Master and Registrar in Chancery and Clerks, and Deputy Clerks of Crown to make returns. Taxes to be computed from this date. Municipal Elections.
6. Sat... *Epiphany.* Christmas vacation in Chancery ends. County Court Term ends.
7. SUN. *1st Sunday after Epiphany.*
8. Mon.. Election of Police Trustees in Police Villages. County York Assizes begin.
10. Wed.. Master and Registrar in Chancery to pay over fees to the Provincial Treasurer.
12. Fri... Court of Error and Appeal Sittings.
13. Sat... Treasurers and Chamberlains of Municipalities to make returns to Board of Audit.
14. SUN.. *2nd Sunday after Epiphany.*
15. Mon.. Municipal Councils (ex-Councils) and Trustees of Police Village to hold first meeting.
16. Tues.. Heir and Devisee Sittings end.
20. Sat... Articles, &c., to be left with Secretary of Law Society.
21. SUN.. *3rd Sunday after Epiphany.*
23. Tues.. First meeting of County Council.
28. SUN.. *Septuagesima Sunday.*
30. Tues.. Last day Non-Residents to give list of their lands.
31. Wed.. Last day for City and County Clerk to make yearly returns to the Provincial Secretary. Last day for Councils to return debts, &c.

THE

Canada Law Journal.

JANUARY, 1872.

PROCEEDINGS OF THE LAW SOCIETY.

On another page will be found a report of the proceedings of the Benchers in Convocation, which has been handed to us for insertion, under an order to that effect.

Without doubt it will be read with interest, not merely because it contains in itself information on matters of professional interest, and is an evidence of the vitality of the Law Society, but because it throws open to all who care to know, what is the inner working of a Society which has so much power to advance and maintain the welfare and present high standing of the Bench and Bar in this Province.

This order for the publication of the proceedings in Convocation may also be looked upon as a proper sequence from the elective system which has lately been introduced, that those who send their representatives to Osgoode Hall should be able to learn from an authentic source what they do when they go there; and as to the order for publication in this journal, it is proper that it should be the medium for the conveying this information to the profession, and the only medium, as being the only exclusively legal publication in the Province.

THE LAW REFORM COMMISSION.

Thomas Moss, Barrister-at-Law, of this city, has been appointed an additional member of the Law Reform Commission. It was objected by some that there was too great a preponderance of Common Law men on the Board, as at first constituted. This objection, though we must confess not to have been pressed with the importance of it, can no longer be raised, and so far as the recent appointment is concerned, it cannot but be considered as a most desirable one. Though a very young man, Mr. Moss has attained a position at the Equity Bar, which is scarcely second to that of the present leader of the Government of Ontario, during whose auspices the appointment has been made. What renders Mr. Moss peculiarly fit for the duties required by the Commission is, that he has an intimate knowledge of both Law and Equity, which few, if any, members of the Bar possess in the same degree.

As a whole, the composition of the Commission is excellent. Our only fear is that the members, being all men full of business of a pressing and engrossing nature, judicial and professional, will scarcely be able to give to the subjects of their labours that degree of time and attention, which its importance demands.

DECISIONS IN THE OFFICE OF THE MASTER IN CHANCERY.

We propose to insert in our columns, from time to time, decisions of the Master upon questions of importance to the profession, arising before him. One very obvious necessity for this is the desirability of securing uniformity of practice in the offices of the various Masters throughout the Province.

Under the old system in England, when there were half-a-score of Masters in ordinary of the Court of Chancery, one of the great grievances of the profession was that each Master had his own practice. Each one, in the way of regulating and conducting the business before him, did that which seemed good in his own eyes. To compare small things with great — the Masters acted the *rôle* of the Chancellors in olden time, as set forth in the biting language of Selden: "For law we have a measure, and know what we have to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should

make the standard for the measure of the Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a small foot, a third an indifferent foot. It is the same thing with the Chancellor's conscience." In this Province are some twenty-four local Masters, and we think that it will greatly further the maintenance of a uniform practice to report the decisions made in the head office by the Master at Toronto.

SECURITY FOR COSTS FROM FOREIGNERS WITHIN THE JURISDICTION.

FIRST PAPER.

The reason of the law requiring security for costs is given by Alderson, B., in *Barratt* v. *Power*, 9 Exch. 339, viz., that in the event of judgment going against a person residing abroad, he cannot be taken in execution under the process of the court. Under the present state of the law in this province this reason is not applicable, as all process of a personal nature for the enforcement of judgments is quite abolished. Nevertheless, the practice continues of requiring security for costs in all cases of an absent plaintiff. With this branch of the practice generally it is not our intention now to deal, but with that particular part of it merely, which is set out in the caption of this article.

It was held by the late Sir John B. Robinson, sitting in Chambers in 1855, that when a plaintiff whose residence was in England came out to this country merely for the purpose of attending to the suit, and intending to return when it was over, he must give security for costs: *Gill* v. *Hodgson*, 1 Prac. R. 381. In 1863, this case was doubted by Mr. Justice Adam Wilson, sitting in Chambers, and he refused to be bound by it: *Hawkins* v. *Patterson*, 3 Prac. R. 262, 9 U.C.L.J. 324. There the true rule was held to be, that if a plaintiff be actually a resident in the province at the time of the application, and if he intend to remain here until after trial or judgment in the cause, then security should not be ordered.

This conflict of authority has not been pronounced upon by the full court; and the question arises, which case correctly represents the law. This question we shall deal with,—and to do so properly a short historical review of the cases touching upon this branch of practice had better be made. In the English Common Pleas it has always been held that the court will not require the plaintiff to give security for costs on account of his being a *foreigner*, if he be actually in England; *Porrier* v. *Carter*, 1 H. Bl. 106 (1789): *Jacobs* v. *Stevenson*, 1 B. & P. 96 (1797); *Mariq* v. *Hall*, 2 B. & P. 236. In *Ciragno* v. *Hassan*, 6 Taunt. 20, s. c. 1 *Marsh.* 421 (C. P. 1815), the court refused to order security where the plaintiff was a foreigner about to go abroad, but who was yet in the country. This case was followed by the same court in 1819, in *Anon.* 3 Moo. 78, s. c. 8 Taunt. 737. In the same year the court refused the order even when the plaintiff, being a foreigner, was absent from the country; but it was shewn that he resided in England four months in the year: *Durell* v. *Matheson*, 8 Taunt. 711.

In 1840, the Court of Exchequer adopted the practice of the Common Pleas, refusing to order security in a case where the plaintiff was a foreigner usually resident abroad, and was out of the jurisdiction at the time the suit was commenced, though within it when the application was made: *Darling* v. *Harman*, 6 M. & W. 131. This case was followed by the same court in 1852, when the principle was laid down that security for costs should not be exacted from a foreigner unless he be actually out of the jurisdiction: *Tambisco* v. *Pacifico*, 7 Exch. 816. The court here refused to follow (the leading case on the other side of the question) *Oliva* v. *Johnson*, 5 B. & Ald. 908, decided in the Q. B. in 1822, where security was ordered: the plaintiff there being a native of Canada, and though then in England, yet having no permanent residence in that country.

The court of Common Pleas has been careful to mark the distinction between the general rule, that if the plaintiff being a subject is not domiciled in England he will have to give security; and the case of a *foreigner*, whose temporarary residence is sufficient to exempt him from giving security: see *Naylor* v. *Joseph*, 10 Moo. 522; *Mahone* v. *Martine*, 4 Moo. 357; Chitty's Archb., 12th ed. 1415. The case of *Gurney* v. *Key*, 3 Dowl. 559, decided by Williams, J., in 1835, appears to have been the case of a British subject who was out of the country at the time of the application: see 9 U.C. L. J. 325. An exceptional case is to be found among the decisions of the Common Pleas, in *St Leger* v. *Di Nuovo*, 2 Sc. N.

R. 587 (1841), where a foreigner, at the time within the jurisdiction, was ordered to give security, as it was sworn and not denied that he had no permanent residence in the country. No cases were cited, and the decision seems to be based on the special circumstances.

Of later cases, *Drummond* v. *Tillinghast*, 16 Q. B. 740 (1851), recognizes *Oliva* v. *Johnson*, though being a case where the plaintiff was a *mariner* as well as a foreigner, the decision proceeded upon special grounds. So in *Rylander* v. *Barnes*, 6 H. & N. 509, the plaintiff was a foreign *sailor*, and as he did not swear that he intended to remain in the country till the termination of the suit, but merely that he was in the habit of remaining in England for considerable periods, security was ordered.

(To be Continued.)

LAW SOCIETY OF ONTARIO.

Michaelmas Term—1871.

The following is a *resumé* of the proceedings of Convocation, during last Term, published by order of the Benchers:

Monday, 20th November.—The application of Hon. J. H. Gray, for call to the Bar, was deferred for want of notice.

Ordered, that the second Thursday and Friday in Michaelmas Term be examination days for Scholarships.

Tuesday, 21st November.—The resignation of Edward Blake, Esq., Q. C., was presented by Mr. Morrison, and accepted.

Messrs. J. D. Armour, Crooks, C. S. Patterson, McCarthy and McKenzie, were appointed Examining Committee for next Term.

Report of Examining Committee of this Term adopted.

Abstract of balance sheet laid on the table.

Mr. Treasurer reported the sale of Sterling bonds, and deposit of proceeds in the Bank of Toronto.

Hour of meeting of Convocation ordered to be half-past ten in the forenoon.

Ordered, that a list of Attorneys and Solicitors taking out certificates be delivered by the Secretary to the Solicitor of the Society by the first day of January yearly, and any found practising without certificates to be proceeded against.

Mr. Crooks was placed on the Legal Education Committee, and Mr. Moss on Committee on Reports, in the place of Mr. E. Blake.

A meeting of Benchers ordered to be had for last Friday in this Term, for election of a Bencher in the place of Mr. E. Blake.

Wednesday, 22nd November—Ordered, that the Committees of Finance and Economy be consolidated, and be called the Finance Committee, and that three be a quorum.

Report of the Finance Committee was brought up, and ordered for consideration on Wednesday next.

Friday, 24th November.—The intermediate examinations for the third and fourth years were held.

Convocation adjourned to 29th instant.

Wednesday, 29th November.—Mr. Treasurer laid on the table a rule of the Court of Queen's Bench, striking John Edward Stark off the roll of Attorneys, with certificate of R. G. Dalton, Clerk of the Crown, that he had been struck off, and an order of the Court to transmit the rule to the Law Society; when it was ordered that John Edward Stark be suspended from practice at the Bar, and certificates to that effect be sent to each of the Superior Courts, and the County Court of Haldimand, in which county he was practising.

Reports of the Committees on Legal Education and Reports received, and ordered to be considered, as well as reports of Finance Committee, at next meeting.

Ordered, that the Chairmen of the Committees of Finance, Reports and Legal Education, be a Special Committee to prepare any bill to be submitted to the Legislature, that may be necessary to carry out all or any of the reports of the Commitees of which they are Chairmen.

Ordered, that Mr. Molloy be paid fifty dollars per annum, in lieu of the fees which he lost by the abolition of lectures.

Convocation adjourned to Wednesday next.

Friday, 1st December.—The Scholarship examinations resulted as follows:

Fourth year.....	None awarded.
Third year	Mr. Barker.
Second year	Mr. McMillan.
First year	Mr. Pepler.

Wednesday, 6th December.—Report of Finance Committee was considered and adopted, but not to apply at present to Secretary and Sub-Treasurer.

Report of Library Committee was adopted.

Report of Committee on Reports was adopted, subject to future action of Convocation as to parts thereof.

A Bill to amend the Acts of the Law Society was brought up, and ordered to be further considered by Mr. Treasurer, and reported by him on Friday next.

Report of Committee on Legal Education was adopted.

Committee of Finance ordered to provide for a complete and effective system of ventilation for Library and Convocation-room.

Mr. B. H. Vidal was allowed his terms while absent in the army.

A *resumé* of the proceedings of Convocation, signed by the Treasurer, ordered to be published in the *Canada Law Journal*, after each Term.

Messrs. Irving, Q. C., and F. Osler were appointed to audit the accounts of the current year.

Friday, 8th December.—Mr. Samuel H. Blake was elected a Bencher in the room of Mr. Edward Blake, resigned.

Messrs. Leith, Anderson and Proudfoot were appointed Examiners for 1872.

Mr. Crickmore was ordered to be paid one hundred dollars for his services as Examiner this Term.

A petition for an amended bill to the Legislature was adopted.

A draft of an amended bill was adopted, and Mr. Treasurer requested to ask the Attorney-General to take charge of the same; and a Committee appointed to look after passage of bills.

Ordered, that an additional appropriation of six hundred dollars be made in favour of the Library Committee.

Messrs. S. H. Blake and M. C. Cameron were placed on the Library Committee on Reports, instead of Messrs. Crawford and McCarthy.

Mr. S. H. Blake was placed on the Library Committee instead of Mr. M. C. Cameron.

The names of the several gentlemen called to the bar, and admitted as attorneys and students during the Term, appear officially as usual.

J. Hillyard Cameron,
Treasurer.

Osgoode Hall, Jan. 20, 1872.

LEGAL NOTES.

A Law Society has been formed for the Province of Manitoba—at least so says a paper published there. The Officers, who appear to be elective, are as follows:

President, Hon. Henry J. Clarke, Q. C., Attorney-General; Treasurer, D. M. Walker, Esq.; Secretary, W. B. Thibaudeau, Esq. (formerly of Kingston, Ontario). Board of Examiners:—J. F. Bain, Esq., Chairman; D. M. Walker, Esq., and W. B. Thibaudeau, Esq., English Examiners; Joseph Royal, Esq., and Joseph Dubuc, Esq., French Examiners.

The Society propose to establish a Library without delay. We wish them every success.

The last *Ontario Gazette* states that a commission has issued to the Judges of the Superior Courts of Law and Equity, under 34 Victoria, capter 7 (Ontario), to report to the Legislative Assembly in respect of any Bills, or petitions for Estate Bills, which may be submitted to the House. We trust that this wholesome provision of the Legislature may have the effect of stopping such measures as the Goodhue Bill and other like matters. It is a pity this provision did not come into force before legislation so discreditable in principle had taken place. There is still some hope that it may be disallowed by the Governor-General. We should be sorry to see the act ventilated on an appeal to England from our Court of Appeal, if the judgment there should sustain that of the Court of Chancery.

Skilled witnesses are generally great bores. It has been observed that medical men, as a rule, are peculiarly grandiloquent, abounding in resonant technicalitics and scientific monstrosities when placed in the witness-box. We notice that an able medical witness, in an English assize court, lately furnished the opposite counsel with the burden of a telling speech, by informing him that his client's "muscular contractibility responded readily to the electro-galvanic influence."

La Revue Critique de Legislation et de Jurisprudence du Canada.—This review has been highly commended by legal writers in England, as being a very creditable production, in which the subjects are well chosen, and the articles carefully written. In judicial language, we "concur."

In giving the names of those gentlemen who passed their first intermediate examination in Michaelmas Term, we overlooked that of Mr. D. E. McMillan, of Guelph, which should have been included among the number.

By Imperial statute 34–35 Vic. cap. 112, children under fourteen, and without proper guardianship, may, under certain circumstances, be sent by the court to an industrial school. We understand some such, or rather a more extended act is to be applied for during the next session of the Ontario Parliament, in connection with the Boys' and Girls' Home. It is becoming impossible properly to deal with vagrant children, so as to cause them to grow

up with a prospect of leading useful lives. A compulsory power of detention in charitable institutions seems to be wanted.

An English statute, which came into force last November, provides for criminals being photographed in prison, and for the distribution of such photographs, with a view to facilitate identification, and thereby prevent crime.

It is perhaps not generally known among the profession in this country, that the late Mr. Justice Norman, acting Chief Justice at Calcutta, who came to a tragic end, having been assassinated by one of the natives, was the author of the well-known treatise on Patents, and was at one time a reporter in the English Exchequer, in conjunction with Mr. Hurlstone. These reports are sometimes erroneously cited as "Exchequer, New Series," and are unfortunately so lettered on the back of the copy in Osgoode Hall library.

The English *Law Journal*, referring to the late case of *Johnson* v. *Emerson & Sparrow*, 40 L. J. N. S. Exch. 201, says: "We believe no case will be found in the books, occupying greater space." The length is occasioned by the elaborate judgments upon the question whether or not the defendants were guilty of maliciously procuring the plaintiff to be adjudicated a bankrupt. The court was equally divided. One judgment was withdrawn, and the case goes to the Exchequer Chamber. As to the mere length of the report, we think the *Law Journal* will find that it is surpassed by the Admiralty case of *Banda and Kirwee Booty*, L. R. 1 A. & E. 109. The Exchequer case is reported in L. R. 6 Exch. p. 329, and there occupies 74 pages: the Admiralty case was argued by 37 counsel, representing different interests, and fills 160 pages. True, it may be said of this latter case that it is really a consolidation of several cases.

We observe that the Supreme Court of Pennsylvania has suspended an attorney rejoicing in the name "J. Charles Dickens," by reason of his attempting to intoxicate his opponent, in order to take an advantage of him, "until the offence should be thoroughly purged." The unprofessional singularity of the misconduct, and the mysterious duration of the term of punishment, are alike provocative of profound amazement.

THE REPORTERS AND TEXT WRITERS.

An industrious writer for the *American Law Review* has extracted from the judgments and sayings of eminent Judges, and other authorities, the sayings expressed by them with reference to the Reporters and Text Writers to whom they refer. This compilation cannot fail to be of interest to those who are in the daily habit of using these books. We copy the collection in full, and may hereafter add some notes of our own on the same subject:

Abbott on Shipping, 542 note *u*, 11th ed. In the preface of this edition the late Mr. Justice Shee wrote: "With the exception of one passage (note *p*, 78) composed by the author, and one, the only one of his composition which the editor had ventured to alter, to be speedily restored by him, in submission to the opinion of the Court of Queen's Bench (note *u*, 542), he is not aware that the law, as laid down by Lord Tenterden, or offered in any edition of this work to the acceptance of the profession, has been authoritatively questioned."

Addison on Contracts.—"An able book."—Parke B. in *Ellen v. Topp*, 15 Jur. 452.

Amos and Ferard on Fixtures.—"An excellent book."—Lord Campbell, C. J., in *Martin v. Roe*, 7 El. & Bl. 247.

Angell on Watercourses.—"A very able treatise."—Lord Wensleydale in *Chasemore v. Richards*, 7 House of Lords Cases, 383.

Archbold's Criminal Pleading and Evidence.—The third edition swarms with errors, the work of an anonymous editor. They were carefully expunged in the fourth edition, which was edited by John Jervis, Esq., late Lord Chief Justice of the Court of Common Pleas.

"Precedents by persons who are deceased are had recourse to as a sort of authority, and no doubt they are justly entitled to it; but in this particular case, with all the respect I feel for Mr. Archbold and Mr. Jervis, I find that the two precedents differ, and I think the best course to adopt is not to pronounce an opinion upon them, but to look at the words of the Act."—Coleridge, J., in *The King v. Kendrick*, 3 Neville & Manning, 407 (1835).

In *Regina v. Webb*, Temple & Mew, C. C. 28, it was said at the bar that Archbold's forms have not received any public approbation, nor are they to be considered as law. Pollock, C. B., in answer, observed: "Generally speaking, Mr. Archbold's publications are remarkable for their accuracy, and I know no person who has contributed more

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to the profession, by his great diligence and learning." But in *Regina v. Ion*, 2 Denison C. C. 488, when the eleventh edition of Archbold's Criminal Pleading, by Welsby, was cited, the same learned judge said that Mr. Welsby was "not yet an *authority*."

Atkyns's Reports.—Mr. Justice Buller says: 'This case is miserably reported in the printed book; and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way; and perhaps, even he himself, by being very diffuse, has laid a foundation for doubts which otherwise would never have existed."—Buller, J., in *Lickbarrow v. Mason*, 6 East, 29, 1 Smith L. C. 739, 6th ed. See *Holland v. Holland*, 20 L. T. N. S. 59.

Bacon's Abridgment.—"It is well known that Bacon's Abridgment was compiled from the MS. of Chief Baron Gilbert."—Per Blackburn, J., in *The Queen v. Ritson*, L. R. C. C. 204. The title "Leases" is generally considered to be the best of the many valuable expositions of the law in this work. Mr. Justice Coleridge speaks of it as "admirable," in his edition of Blackstone's Commentaries, Vol. II, p. 320, note 13.

Ballow (Henry).—Treatise of Equity. London, 1737. Henry Ballow is the reputed author of this excellent old work. Of the late editions, Mr. Justice Sharswood observed that it has become "as has been well remarked, 'a rivulet of text meandering through a wilderness of notes.'" 60 Penn. State, 227.

Barnardiston.—"Is not a reporter to be relied on in all cases."—Stuart, V. C., *Holland v. Holland*, 20 L. T. N. S. 59.

Barnewall and Alderson's Reports.—In a recent case, the reference to which is mislaid, the late Baron Alderson remarked that he was not responsible for the first part of the first volume. It was reported by Selwyn and Barnewall.

Barnes's Notes.—"Much indifferent law is to be found in Barnes's Notes."—Pollock, C. B., in *Williams v. Holmes*, 22 L. J. Exch. 284.

Beck's Medical Jurisprudence.—"This is a work of high reputation, but we cannot regard its statements as evidence."—*Phillips v. Allen*, 2 Allen 456.

Best on Evidence.—Mr. Justice Willes, in *Regina v. Briggs*, Dearsly & Bell C. C. 102, characterized this as one of the best books on our laws. And Stuart, V. C., in *Marritt v. The Anchor Reversionary Co.*, 8 Jur. N. S. 52, pronounced it "a very remarkable book." See also the observations of Willes, J., in *Hollingham v. Head*, 4 C. B. N. S. 391, and in *Ex parte Fernandez*, 10 C. B. N. S. 40.

Blackburn on the Contract of Sale.—"Another authority referred to entitled to great respect."—Bramwell, B., in *Chinery v. Viall*, 5 H. & N. 294.

Bracton.—Designated by Sir William Jones, "the best of our juridical classics." Treatise on Bailments, 75.

Brooke's Abridgment.—"High authority."—Kelly, C. B, in *Martin v. Woods*, 38 L. J. Q. B. 86. As reported in L. R. 4 Q. B. 305, "Great authority."

Burn's Justice.—In *Regina v. Williams*, Temple & Mew C. C. 241, a warrant issued by justices of the peace was held to be bad. Maule, J., observed: "They follow the form in Burn's Justice; but it is not the first form in that work which has been objected to, and decided to be wrong."

Campbell's Reports.—In a very recent case, Lord Cranworth, L. C., observes: "Although that was merely a dictum in a *nisi prius* case, yet on all occasions I have found on looking at the reports, by the late Lord Campbell, of Lord Ellenborough's decisions, that they really do, in the fewest possible words, lay down the law, very often more distinctly and more accurately than it is to be found in many lengthened reports; and what is so laid down has been subsequently recognized as giving a true view of the law as applied to the facts of the case." *Williams v. Bayley*, L. R. 1 H. L. 213.

Carrington and Payne, and 'Espinasse's Reports.—Of these two reporters, Blackburn, J., said: "Neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood." *Redhead v. Midland Railway Company*, 8 Best & Smith, 401; 9 Best & Smith, 531; L. R. 4 Q. B. 388. See 'Espinasse.

Carter's Reports.—In *Pennoyer v. Brace*, Comberbach, 441, Lord Holt disclaimed all knowledge of "that Carter," and would not allow his authority. 4 C. B. 592 note.

Chalmer's Opinions of Eminent Lawyers. Forsyth's Cases and Opinions on Constitutional Law.—In *Phillips v. Eyre*, 40 L. J. N. S. Q. B. 28, the Court of Exchequer Chamber allowed these works to be referred to as part of the argument of counsel, but not as possessing any authority. P. 29 n. (1).

Chitty's Archbold's Practice of the Court of Queen's Bench in Personal Actions and Ejectment.—"There is an admirable book,—Mr. Prentice's edition of Chitty's Archbold's Practice,—

a most useful book,—one of the best books ever written."—Martin, B., in *Andrews v. Saunderson.* 3 Jur. N. S. 118, 119.

Coke's Fourth Institute.—"Holt said the Fourth Institute had not my Lord Coke's last hand; the judges have not allowed that so much as the other parts; though the Second Institute be a posthumous work, yet it is more perfect."—*Rex v. Pain*, Holt, 295.

Coke's Reports.—Mr. Justice Putnam thus expressed his opinion of Coke's style of reporting: "There was no necessity for the court to have decided the various matters which were resolved in the case; but if the readings and resolutions which we find in Lord Coke's Reports, which were not necessary for the decision of the particular case, were struck out, an immense proportion of the common law there digested and clearly stated would be lost, unless with infinite labor it should be collected from the Year Books and other black-letter authorities. The extra-judicial opinions of Lord Coke contain more of the common law than is to be found in the writings of any other reporter before or since his time. His mode of reporting, however, should be considered as the exception to the general rule, rather than the one which should be adopted at this day. *Arnold v. Arnold*, 17 Pick. 9, 10. And Lord Mansfield remarked of The Reports: "My Lord Coke was very fond of multiplying precedents and authorities; and, in order to illustrate his subject, was apt, besides such authorities as were strictly applicable, to cite others, not applicable to the question under judicial consideration." *Rex. v. Cowle*, 2 Burr, 858. See also Sugden on Powers, p. 22 note, 7th ed.

Lord Coke himself thus states "the method the reporter doth use:" "I challenge that which of right is due to every reporter, that is, to reduce the sum and effect of all to such a method as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest or the right understanding of the true reasons, and causes of the propositions and resolutions of the case in question." *Calvin's Case*, 7 Rep 4 *a*.

Comberbach's and Carthew's Reports.—In *Dyer v. Best*, 4 H. & C., 194 note, Pollock, C. B., referred to Clarke's Bibliotheca Legum, 355, where the authority of these reporters is impugned. Lord Denman, C. J., also has said: "Comberbach is very far indeed from being a reporter to whose doubt any importance should be attached. I remember hearing Lord Kenyon say so, very early in my professional career. Lord Erskine, then at the bar, founded an argument upon the remark of Lord Kenyon. He admitted its truth, but said that a sentence or two in the report which he then used were on that account of great weight, as they must have been really delivered by the court; for, he said, they contained something like sense, and therefore could not be Comberbach's own." *Newton's Case*, 13 Q. B. 726 and note.

Dickens's Reports.—"It is scarcely necessary to notice this case. The accuracy of Dickens's Reports is not to be relied upon, and this case is a remarkable instance of their inaccuracy."—Stuart, V. C., in *Holland v. Holland*, 20 L. T. N. S. 59.

Digest, The.—"The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle; but they do not bin d us."—Blackburn J., delivering the considered judgment of the Court of Exchequer Chamber in *Appleby v. Myers*, L. R. 2 C. P. 660.

Dyer and Lord Raymond.—"There are a good many cases in the time between Dyer and Lord Raymond (1621–1694), (which may properly be called the middle age of the law) in respect to which one hardly knows what to say. They have been doubted and denied, and then again supported and qualified; and in some instances there is a string of cases each way, so that it is difficult to say which is the best authority."—Judge Story. Letter to Simon Greenleaf, Esq., 1819. Story's Life and Letters, Vol. I. 328.

'Espinasse's Reports.—In *Small v Nairne*, 13 Q. B. 844, Lord Denman said: "I am tempted to remark for the benefit of the profession, that Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke's Reports." This remark is quoted by Coleridge, J., in *Wenman v. Mackenzie* 5 El. & Bl. 453. See Carrington and Payne.

Gale on Easements.—"A very excellent book," said Lord Campbell, C. J., in *Renshaw v. Bean*, 18 Q. B. 124. "An excellent treatise," said Lord Wensleydale, in *Rowbotham v. Wilson*, 8 House of Lords Cases, 359. "A work of much ability," says that first class authority, the sixth edition of Saunders's Reports, 2 Saund. 400 *a*.

Greenleaf on Evidence.—The first volume "is to be regarded rather as a discussion and statement of the grounds and principles of proof in general than as a detail of the rules of evidence."—Shaw, C. J., in *Commonwealth v. York*, 9 Met. 106.

The Reporters and Text Writers.

Hale's Pleas of the Crown.—Very soon after the first edition of his Reports was published in 1763, Mr. Justice Foster retracted what he had said in that edition respecting Lord Hale's inaccuracy. See p. xxxii. of the 3rd ed. See also per Monahan, Attorney-General, *arguendo* in *Regina v. Mitchell*, 3 Cox C. C. 117.

"Every one who relies upon Lord Hale should remember, 1st. That he corrected his MSS. only to the twenty-seventh chapter; 2ndly. That Lord Hale, 'not having always had leisure to consult the books themselves, had frequently copied from the misprinted quotations in the margin of Lord Coke's third volume of his Institutes;' which also clearly shows that he had relied on Lord Coke's statements themselves. See the preface to Hale's Pleas of the Crown, pp. xi., xii." 2 Russell on Crimes, 182 note, 4th ed.

It may be observed that writers subsequent to Lord Hale have stated absolutely many things which he delivered under various degrees of assent and modification of doubt. They have omitted such expressions as "but this is but hearsay," "it might be a question," "it seemeth," "*sed tamen quære*," "*quære de hoc*," etc. It has been well said that these are "by no means arbitrary words, without much meaning; but are inserted with the utmost deliberation and judgment." A recent author adds: "These ancient writers advanced timidly over such slippery ways as those of the common law; but by suppressing their misgivings and rushing in where they trod with alarm, an easy passage has been opened by their successors over the legal Alps." Amos's Ruins of Time, p. 2.

Hammond on Parties to Actions.—"An extremely able work."—Martin, B., in *Fairlie v. Fenton*, L. R. 5 Exch. 171.

Hammond's Treatise on the Law of Nisi Prius. —"An admirable work on the subject of torts." —Martin, B., in *Collins v. Cave*, 4 H. & N. 234.

Hawkin's Pleas of the Crown.—"A work of high authority, and a writer that never was supposed to have taken too favourable a view to those prosecuted."—Perrin, J., in *Regina v. O'Connell*, 1 Cox C. C. 378.

"Hale and Hawkins are justly regarded, not as respectable compilers, but as standard authorities."—Gaston, J., in *The State v. Johnson*, 1 Iredell, 363.

Jarman on Wills.—An "eminent writer."—Erle, C. J., in *Roddy v. Fitzgerald*, 6 House of Lords Cases, 823. A "valuable work."—Bovill, C. J., delivering the considered judgment in *Bradley v. Cartwright*, L. R. 2 C. P. 521.

Johnson's Reports.—Williams, C. J., says: "The decisions which are found in Johnson's Reports have always come to us with a weight of authority to which the learning, talents, and exalted legal character of the learned justices who composed the court so justly entitled them."—*Ives v. Hulet*, 12 Vermont, 335.

Keble's Reports.—"It must be admitted that Keble is of no high repute as an accurate reporter; and the court would be slow to act on a case in that book, if it were unsupported by others. . . With respect to the authority of Keble, we cannot refrain from referring to the highly valuable and interesting work of Mr. J. W. Wallace, The Reporters, 207, 208, 3rd ed., from which it appears that more is to be said of this reporter as a 'tolerable historian of the law,' than from the remarks made upon him from time to time might have been supposed."—Williams, J., delivering the judgment in *Farrell v. Hilditch*, 5 C. B. N. S. 853, 855.

Lord Mansfield justly observed on one occasion: "It is objected that the books (Keble's and Freeman's Reports) are of no authority; but if both the reporters were the worst that ever reported, if substantially they reported a case in the same way, it is demonstration of the truth of what they report, or they could not agree."—*Rex v. Gengo*, 1 Cowp. 16.

Kelyng's Reports.—"A book of high authority."—2 Russell on Crimes, 244, 4th ed.

"That is a book which can never be referred to without reprobating the course which appears there to have been taken, of judges and Crown counsel meeting together to settle, revise, and rule beforehand the points of the trial; and we must not forget that the book was edited by Lord Holt, and the preface written by him."—Fitzgerald, J., in *Mulcahy v. The Queen*, Irish Rep. 1 Com. Law, 64.

Law Times Reports.—"It is but right to say that, considering the celerity with which these Reports are published, they are very creditable productions."—Preface to the fourth edition of Russell on Crimes.

Levinz' Reports.—Lord Tenterden: "Levinz is a better authority than Keble." *Rex v. Russell*, 1 Moody C. C. 363. Lord Mansfield, 5 Burr. 2731, and Lord Kenyon, 3 T. R. 17, expressed the same opinion, "which indeed," writes Mr. Wallace, "is not to say a great deal." The Reporters, 206, 3d ed.

Machlachlan on the Law of Merchant Shipping.—"An excellent, able, and well-written work."—Cockburn, C. J., in *Castrique v. Imrie*, Exch. Ch. 30th November, 1860. "An acquisi-

tion to legal literature."—Williams, J., in *Maitland v. Graham*, C. B, 14th November, 1860.

Modern Reports.—"The Modern Reports are a very loose compilation." Blackburn, J., in *Regina v. Allen*, 8 Jur. N. S. 231. "The book called 'The Modern Reports' is not of very high authority."—Best Ev. 745, 4th ed.

Modern Reports, Vol. VII.—"As to the degree of authority to be ascribed to this volume, there is a very great distinction to be made between the first edition and the last. The former appeared in a most imperfect state, and fully deserved the censures which it received from the lawyers of the period. The last edition, revised from the authentic manuscripts, appeared in 1796, under the supervision of Mr. Leach, and has always enjoyed a high authority."—Law Magazine and Law Review, November, 1868, p. 139.

Modern Reports, Vol. VIII.—"Notoriously inaccurate and of no authority."—Bayley, J., in *The King v. Williams*, 3 M. & R. 405.

Modern Reports, Vol. IX.—"The ninth Modern is worse than the tenth."—Littledale, J., in *Doe v. Asby*, 10 Ad. & El. 73. "A case in 9 Mod. with respect to which I may say that there are no reports upon which less reliance can be placed."—Dr. Lushington, *In the Goods of C. Spilly*, 16 Jur. 92.

Modern Reports, Vol. XII.—"Not a book of any authority."—Buller, J., in *The King v. Lyme Regis*, 1 Dougl. 83. Kent, J., in *The People v. Guernsey*, 3 Johns. Cas. 266. "A book of no authority and very small repute, published by an anonymous reporter."—Savage, C. J., in *Ellsworth v. Thompson*, 13 Wend. 658.

Moore (Sir Francis) Reports.—"Moore is a very accurate reporter."—Lord Ellenborough in *Whitbread v. Jenney*, 2 J. P. Smith, 126.

Noy's Reports.—"In the first place it is to be observed, that Noy's Reports are of no credit; they being, according to Mr. Hargrave, only loose notes, compiled from his papers, by Serjeant Size, and imposed upon the world as genuine. But the case itself is solitary and anomalous, and cannot be law.—Kent, C. J. in *Tillitson v. Cheetham*, 2 Johns. 72.

Oliphant on Horses.—"An excellent work."—Willes, J., in *Howard v. Sheward*, L. R. 2 C. P. 151.

Ortolan. Diplomatie de la Mer.—"The work of a French naval officer, but of which a jurist might be proud."—Willes, J., in *Lloyd v. Guibert*, 35 L. J. N. S. (Q. B.) 79.

Peere Williams's Reports.—The edition by Messrs. Morris, Lowndes, and Randall is an "excellent edition."—Lord Brougham, 3 House of Lords Cases. 130.

Phillips on Insurance.—"I take Phillips on Insurance to be a masterly book."—Erle, C, J., in *Carr v. Montefiore*, 5 Best & Smith, 430. "A very able and learned work."—Willes, J., in *Ionides v. The Universal Marine Insurance Co.* 10 Jur. N. S. 21, 22.

Pothier. Treatise on the Law of Contracts.—"It is remarkable for the accuracy of the principles contained in it, the perspicuity of its arrangement, and the elegance of its style.—Lord Tenterden. Preface to his Treatise on Shipping.

Raymond (Robert, Lord) Reports.—Fifth edition, by C. J. Gale, Vol. I., 8vo. pp. 568, London, 1832. "An excellent edition."—1 Smith L. C. 269, 6th London ed.

"A case reported by Lord Raymond himself, and therefore an authentic report."—Blackburn, J., in *Winsor v. The Queen*, L. R. 1 Q. B. 318.

Russell on Crimes, ed. Greaves.—"The editor of Russell on Crimes is known as a gentleman of great learning, ability, and research."—Pollock, C. B., in *Regina v. Curgerwen*, L. R. 1 C. C. 3.

Salkeld's Reports, Vol. III.—"The third volume of Salkeld has always been considered apocryphal."—Willes, J., in *Ilderton v. Castrique*, 14 C. B. N. S. 106. 1 Smith, L. C. 56, 5th London ed. Parsons, C. J., 8 Mass. 258.

Saunders' Reports, ed. Williams.—Martin, B.: "The omission of a case from such a book throws, in my opinion, great doubt upon its authority." *Dyer v. Best*, 35 L. J. N. S. Exch. p. 106; L. R. 1 Exch. 156.

Sedgwick on Damages.—"A most able work."—Cockburn, C. J., in *Engell v. Fitch*, L. R. 3 Q. B

Shower's Reports.—"A doubtful reporter."—Lord Abinger, C. B., in *Sumbolf v. Alford*, 3 M. & W. 253.

Siderfin's Reports. Keble's Reports.—In *Lowe v. Joliffe*, 1 W. Bl. 366 (1763), Lord Mansfield, C. J. is reported to have declared on a trial at bar, that the court "did not then sit there to take its rules of evidence from Siderfin and Keble;" whose reports begin about a century before the time when he was speaking. Best Ev. sec. 109, 5th ed.

Smith's Leading Cases.—Sir Fitzroy Kelly observed, *arguendo*, in the House of Lords, "that he believed that there was not an error to be found in the notes from beginning to end."—*National Exchange Company of Glasgow v. Dick*, 2 Macqueen, 114, note (1855).

The Reporters and Text Writers.

Smith's Mercantile Law.—"A text-book of very great value."—Byles, J., in *Leverson v. Lane*, 13 C. B. N. S. 284.

Starkie's Criminal Pleading.—This book is cited as direct authority in England.—*Regina v. Drury*, 3 Cox, C. C. 546; 18 L. J. N. S. (M. C.) 193 (1849).

State Trials.—The cases in the State Trials before the Revolution, 1688, on the law of evidence, are of no authority.—Lord Campbell, C. J., in *Regina v. Scaife*, 2 Denison, C. C. 283. Wilde, J., in *Cooley v. Norton*, 4 Cush. 95.

Staunforde's Book on Prerogative.—"This book (as well as his Treatise on Pleas of the Crown, which is often cited in the text of Lord Coke's Reports), is a work of considerable authority. I cite it as an evidence of what in his time was the opinion of the profession on the subject."—Pigott, C. B. in *Regina v. Tbole*, 11 Cox C. C. 78.

Taunton's Reports, Vol. VIII.—"Parke, B., has frequently observed of late that the 8th Taunton is but of doubtful authority, as the cases were not reported by Mr. Taunton himself."—Reporter's note, 9 Exch. 347. "Is an apocryphal authority. It was made up from Mr. Justice Taunton's notes, and was not revised by him."—Parke, B., in *Hadley v. Baxendale*, 23 L. J. Exch. 180. 18 Jur. 358; see 6 Best & Smith, 444.

Termes de la Ley.—The first edition was printed in 1563. In ædibus Richardi Tottelli. A book said by Mr. Justice Bayley to be "of great antiquity and accuracy."—*Hewlins v. Shippam*, 5 B. & C. 229.

Text Writers.—"No additional weight is given to decisions by the insertion of the doctrine thereof in legal treatises, however eminent may be their authors."—*Fullam v. West Brookfield*, 8 Allen, 7.

Tidd's Practice.—"This is a book of a very superior kind. It is a work in which the author has treated the subject in a scientific and masterly manner, and has illustrated and explained upon clear principles those rules of practice, which, in most other works of this nature, appear to be a collection of a mere positive and arbitrary institution."—Mr. Serjeant Williams, 1 Saund. 318 *b*, 6th ed. This book is cited in the courts, not merely as a standard text-book, but almost as an *authority*, on account of its unrivalled accuracy.

Ventris's Reports.—"This case is a mistake. The reporter was then a young man."—Denison, J., in *Wilson v. Greaves*, 1 Burr. 244.

Viner's Abridgment.—"A work of stupendous labor and research." Mr. Hargrave styles it "an immense body of law and equity, and worthy, notwithstanding all its defects and inaccuracies, of forming a necessary part of every lawyer's library." Co. Litt. 9 *a* in notes.

Wallace (John William).—The Reporters, Chronologically Arranged, with occasional Remarks on their Respective Merits. 3rd ed. 8vo. 1855. "A work remarkable for learned research."—Erle, C. J., in delivering the considered judgment of the court in the great case of *Kennedy v. Broun*, 13 C. B. N. S. 728.

"Wentworth's Pleader is a book of no authority; it is a collection of very vicious precedents."—Lord Abinger, C. B., in *Sunbolf v. Alford*, 3 M. & W. 251. And again at p. 253: "As to the supposed authority of Wentworth, it is really no authority whatever. Mr. Wentworth was not a reporter; his is a vast collection of pleadings, obtained from Mr. Lawes and one or two other gentlemen, which he threw together, and which I have found in a very long career of professional life to be in a great measure extremely incorrect; and it cannot be assumed that there is the least authority to be derived from his statement."

Wigram's Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills.—"An admirable work very well worthy of the attention and study of every student of the law."—Lord Wensleydale in *West v. Lawday*, 11 House of Lords Cases, 388.

Williams on Executors.—"A valuable work."—Blackburn, J., in *Fleet v. Perrins*, L. R. 3 Q. B. 542.

Year Books.—"Lord Chief Justice Gibbs used to say that he could get authorities in the Year Books for any side in any thing".—Lord Lyndhurst, Lord Chancellor, in *Gray v. The Queen*, 11 Clark & Finnelly, 441.

"It is much to be regretted," writes Mr. Rawle, "that some patient industry has not as yet achieved a translation of the Year Books, as they are, even at this late day, not unfrequently quoted, and not always with entire accuracy, and any one who has sought to trace in them a principle to its foundation, will be struck with the apparent contrarieties which they present, which would doubtless be to some extent explained could the contents of these volumes be presented in a more familiar shape." Covenants for Title, 207 note, 3rd ed.

NEW RULES OF THE COURT OF ERROR AND APPEAL.

We publish the General Rules and Orders of the Court of Error and Appeal, promulgated 8th September last. They are to be found in a recent number of the Chancery Reports, but, curiously enough, the assistant librarian at Osgoode Hall had not until a short time ago been made acquainted with the fact that such rules were in existence. Many of the profession also may be benefited by some enlightenment on this subject, even at this late day. They are as follows:

General Rules and Orders.

1.—Upon, from, and after this date, all Rules heretofore made, and now in force, regulating the practice and proceedings in civil cases in this Court, are annulled; and the following Rules, made under the authority of the Consolidated Statute of Upper Canada, chapter thirteen, section sixty-four, are substituted for the same.

2.—That, unless otherwise specially ordered, the security to be given in all cases of Error and Appeal, shall be personal, and by bond, and may be in the form given in the Rule numbered seven, and shall be filed in the office of the Clerk of the Court appealed from, in Toronto.

3.—That the security required by the Consolidated Statute of Upper Canada, chapter thirteen, section fifteen, shall be by bond to the respondent or respondents in the sum of four hundred dollars; such bond to be executed by the appellant or appellants, or one or more of them, and by two sufficient sureties (except in special cases, such as absence from the Province, lunacy of the appellant, or other cases of similar difficulty, to be established by affidavit to the satisfaction of the Court appealed from, or a Judge thereof; when an additional surety, in place of the appellant, may be received, by Rule or Order of such Court or Judge); and the condition of the bond shall be to the effect, that the appellant or appellants shall and will effectually prosecute his or their appeal, and pay such costs and damages as shall be awarded in case the judgment or decree appealed from shall be affirmed or in part affirmed.

4.—That when the judgment to be appealed from directs the payment of money, and the appellant desires to stay the execution thereof, then the bond shall be in double the amount of such judgment; unless the same shall be in debt on bond for a penal sum, or upon a warrant of attorney, or *cognovit actionem*, or otherwise, exceeding the sum really due, in which case the bond shall be only in double the true debt, and costs; and the amount so recovered, and of such true debt and costs, shall be stated in the condition, or recital to the condition of the bond, immediately after the statement of the nature of the action; and the condition shall be to the effect that the appellant shall effectually prosecute such appeal, and if the judgment appealed from, or any part thereof, shall be affirmed, shall pay the amount directed to be paid by such judgment, or the part of such amount as to which such judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant in the appeal; provided always that, in cases where the security to be given shall be in a sum above two thousand dollars, it shall be in the discretion of the Court appealed from, or of a Judge thereof, to allow security to be given by a larger number of sureties, apportioning the amount among them as shall appear reasonable; and provided further, that, where the amount by the judgment directed to be paid exceeds ten thousand dollars, it shall be in the discretion of such Court or Judge to allow security to be given for such amount less than double, as shall appear reasonable.

5.—That when the judgment appealed from shall be in an action of ejectment, the security required by the last preceding Rule shall be taken in double the yearly value of the property in question; and in cases where the matter in question shall relate to the taking of any annual or other rent customary, or other duty or fee, or any other such like demand of a general and public nature affecting future rights, the amount in which such security shall be taken, in addition to the security required for costs, shall be fixed by order of the Court appealed from, or a Judge thereof.

6.—That in all other cases falling within any or either of the exceptions contained in the sixteenth section of the said statute, chapter thirteen, the security shall be personal and by bond, and the condition shall be made suitable to the circumstances, and shall, as well as the bond and the recitals and conditions required under the Rules numbered four and five, contain such further and other conditions as shall be directed by any special order in that behalf made by the Court appealed from, or by a Judge thereof.

7.—The bond may be in the following form, to be varied as occasion may require, under any of the foregoing Rules:

Know all men by these presents, that we (naming all the obligors, with their places of residence and additions), are jointly and severally held and firmly bound unto (naming the obligees, with their places of residence and additions), in the penal sum of ——— dollars, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, exe-

cutors and administrators, respectively, firmly by these presents.

Witness our respective hands and seals, the —— day of ———, in the year of our Lord, 18—.

Whereas the (appellant) complains, that in the giving of judgment in a certain suit in Her Majesty's Court of Queen's Bench (or of *Common Pleas*, as the case may be), in the Province of Ontario, between (naming the parties to the cause), in a plea of ———, manifest error hath intervened; wherefore the (appellant) desires to appeal from the said judgment to the Court of Error and Appeal.

Now the condition of this obligation is such, that if the (appellant) do and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed, then this obligation shall be void, otherwise to remain in full force.

8.—That the parties to every such bond as sureties shall, by affidavit respectively, make oath that they are resident householders or freeholders in Ontario, and severally worth the sum mentioned in such bond, over and above what will pay and satisfy all their debts; which affidavit may be in the following form:

In the (*style of Court*).

A. B., plaintiff, *v.* C. D., defendant. } I, E. F., of ——, make oath and say, that I am a resident inhabitant of Ontario, and am a householder in (or a freeholder in ———), and that I am worth the sum of ——— (the sum mentioned as the penalty, or such sum as the deponent is bound in) over and above what will pay all my debts; and I, J. H., of ———, make oath and say, that I am a householder in ——— (or a freeholder in ———), and that I am worth the sum (as in the former case) of ———, over and above what will pay my debts.

The above-named deponents, E. F. and G. H., were sworn at, &c., the —— day of ———, 18—, before me.

———, Commissioner, &c.

9.—That in case of appeals from the Courts of law, fourteen days' notice shall be given of the time and place at which application will be made to the Court from whose judgment it is intended to appeal, or, in vacation, to a Judge, for the allowance of such security, which notice shall contain the names and additions of the obligors.

10.—That the allowance of such security may be opposed by affidavit; but that, in the absence of any such opposition, the affidavit above mentioned shall be sufficient, in the discretion of the Judge, to warrant the allowance thereof.

11.—That if allowed, the officer of the Court shall endorse on such bond the word "allowed," prefixing the date and signing his name thereto; upon which such security shall be deemed perfected.

12.—That in every appeal from either of the Courts of Common Law upon a special case, the appellant shall prepare and file with the Clerk of the proper Court, at his office in Toronto, a true copy of such case, and of the judgment or decision of the Court appealed from, and shall give immediate notice in writing of such filing to the opposite party.

13.—That in every appeal from the decision of either of the Courts of Common Law, upon a rule to enter a verdict or nonsuit on a point reserved at the trial, or upon a motion for a new trial upon the ground of misdirection, or upon a rule whereby a by-law or any part of a by-law has been quashed, the appellant shall prepare and file with the Clerk of the proper Court, as aforesaid, a statement of the case, the pleadings, evidence and affidavits, or so much thereof as shall be necessary, and of the rule, order, judgment or decision of the Court, together with the reasons of appeal, and shall give immediate notice in writing of such filing to the opposite party.

14.—That the respondent may, within eight days after being served with such notice, apply to any Judge of the Court appealed from, for a summons to alter and amend the special case, or the statement so filed, which Judge, on the return of such summons, may approve or modify the same, as to him shall seem proper.

15.—That if no such application be made within eight days next after the day of service of the notice, the copy of the special case, or the statement so filed, shall be deemed correct for the purpose of the appeal.

16.—That before the expiration of eight days from the service of notice, or if a Judge's summons has been obtained under the foregoing Rule number fourteen, then within four days after such summons shall have been disposed of, or within such longer time as may be fixed by the Judge, the respondent shall file with the Clerk of the Court whose decision is appealed against, his reasons against such appeal.

17.—Unless the appellant shall, with the memorandum required by the thirty-third section of the aforesaid statute, chapter thirteen, file a copy of his grounds of appeal, the respondent may, by notice in writing, demand the same; and if the grounds of appeal are not filed within eight days after service of such demand on the appellant, his attorney or agent, the appeal, upon proof by affidavit of the service of the demand, and that the grounds of appeal were not filed as above required, shall be dismissed with costs; but the appellant may, within the eight days, apply to the Judge for further time to file his reasons, and the Judge may in his discretion allow the same.

18.—That unless the respondent shall, within eight days after the filing of the appellant's

grounds of appeal and notice in writing thereof given to him, his attorney or agent, file his joinder thereto, and reasons for sustaining the judgment, the appellant may, in writing, demand the same; and unless the respondent file such joinder and reasons within eight days after the service of such demand, the respondent shall be precluded from filing the same without the leave of the Court, or a Judge thereof, first had and obtained upon a rule *nisi* or summons; and the Court of Error and Appeal will proceed *ex parte* to hear the cause on the part of the appellant, and to give judgment thereon without the intervention of the respondent.

19.—That the case, so stated and settled, together with the reasons of appeal and affidavit o service, shall forthwith be delivered by the Clerk of the Court, whose decision is appealed against, to the Clerk of the Court of Error and Appeal.

20.—That when error on the record is suggested and alleged, copies of the transcript of the judgment, with the suggestion and denial of error, and when any case has been stated and settled under the foregoing Rules numbered twelve and thirteen, copies of such case, with the reasons for and against the appeal, and the opinions delivered by the Judges, shall be printed; and such copies shall be deemed to be the printed cases of the appellant and respondent respectively.

21.—That as soon as the transcript of judgment or case settled shall have been delivered to the Clerk of the Court of Error and Appeal, and not less than four days before the day appointed by the Court for the actual hearing of causes (or before the first day appointed for the then next sittings of the Court), the case may be set down for hearing on the application of either party, and notice of such setting down shall be forthwith given to the opposite party.

22.—That in appeals from the Court of Chancery, all securities, under the fifteenth section of the aforesaid statute, section thirteen, shall be personal, by bond with sureties; which bond shall, as near as may be, be in the form of the bond given in the foregoing Rule number seven, and shall (together with an affidavit of justification, in the form, *mutatis mutandis*, given in the foregoing Rule number eight) be filed with the Registrar of the said Court; and notice thereof shall be served on the respondent, his solicitor or agent; and such security shall stand allowed, unless the respondent shall, within fourteen days, move the said Court to disallow the same. A special application shall be necessary to stay the proceedings under any of the exceptions in the sixteenth section of the said Act, chapter thirteen.

23.—That in every case appealed from Chancery, a copy of the pleadings and evidence, or so much thereof respectively as is material for the purposes of the appeal, shall be printed, together with the opinions delivered by the Judges on the case, and the reasons of appeal, and the reasons for supporting the decree or order; which printed copies shall, for all purposes, be considered the printed cases of the appellant and respondent respectively. The parties may join together in procuring the printing of such copies, one whereof shall be handed to the Registrar of the said Court, whose duty it shall be to examine the same, and, if necessary, to correct it; and the copy so examined by the Registrar shall be marked by him with the words, "examined and approved," to which he shall sign his name; and he shall forthwith deliver that copy to the Clerk of the Court of Error and Appeal.

24.—That where one ground of the appeal is the rejection of evidence or the reception of improper evidence, such evidence shall, where practicable, be printed in a separate part of the book, and with an extra wide margin, and be distinguished by an appropriate heading and marginal note.

25.—That in appeals from the Court of Chancery, if the parties do not agree as to what the printed case should contain, either party may apply to a Judge of the said Court in Chambers, upon notice to all parties interested, which notice is to be served according to the practice of the said Court; and thereupon the Judge will give directions as to what is to be printed.

26.—That the said Court, or a Judge thereof, shall also have the like power of making Orders for the expediting or conducting of proceedings in appeals from the Court of Chancery, as either Court of Law or a Judge thereof has in the case of appeals from such Court of Law; and in case of non-compliance with any such Order, the Court of Chancery or a Judge thereof may order the case to stand dismissed, or to be proceeded with *ex parte*, as the case may require, and as would be the course in the like case on an appeal from either Court of Law.

27.—That in all appeals from any of the said Courts, the appellant shall, within one month after the allowance of the appeal bonds, deliver to the Clerk of this Court the printed cases for the use of the Judges; and shall, at the time of such delivery, enter the case with the said Clerk for hearing at the then next ensuing sittings of this Court; and that, in case of neglect or omission by the appellant to comply with this rule, the respondent may, upon filing with the said Clerk a sworn copy of the order of allowance of

the appeal bond, or a certificate from the Clerk of the Court appealed from, of the day on which such allowance was made, or on which the bond stood allowed (as the case may be), obtain from the Clerk of this Court a certificate of such neglect or omission; and thereupon the appeal shall stand dismissed with costs without further order.

28.—Upon the application of the appellant, supported by affidavit, and after hearing the respondent, if he does not consent to such application, the Court appealed from, or a Judge thereof, may give further reasonable time for delivering the printed cases, and entering the appeal for hearing, as required by the foregoing Rule.

29.—The Clerk of the Court of Error and Appeal shall receive no appeal books unless they are printed on good paper, on one side of the paper only, and in demy-quarto form, with small pica type leaded.

30.—That the Court appealed from, or a Judge thereof, shall allow any bond, notice, appeal or other proceeding, taken or observed under these Rules and Orders, to be amended whenever such amendment shall to such Court or Judge seem reasonable.

31.—That this Court may, in its discretion, postpone the hearing until any future day during the same sittings, or at any following sittings.

32.—That if either party neglect to appear at the proper day to support or resist the appeal, the Court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon payment of such costs as the Court shall direct.

33.—That all Rules and all Orders of this Court, in cases appealed, shall bear date on the day of the judgment or decision being pronounced, and shall be signed by the Clerk of the Court.

34.—That the same fees and allowances shall be taxed in appeal by the Clerk of the Court of Error and Appeal, for attorneys and solicitors, or any officer of the said Court, as are allowed for similar services in the Court from which the appeal is brought; and that counsel fees shall be taxed as follows: In appeals of a simple nature, or where judgment is given at the close of the argument, the officer is to tax a fee not exceeding forty dollars to the senior counsel, and not exceeding twenty dollars to the junior, for the hearing of the appeal; in more important or difficult cases, the fee to the senior counsel shall not exceed eighty dollars, and to the junior fifty dollars: within these limits, the fee shall be in the discretion of the taxing officer; and in all cases the amount of the counsel fees taxed by him shall be subject to be reduced on application to a Judge of the Court appealed from. Not more than fees to two counsel are to be taxed to any party entitled to be heard on an appeal.

35.—That the security to be given in cases of appeal to Her Majesty in Privy Council shall be personal, and by bond to the respondent or respondents; such bond to be executed by the appellant or appellants, or one or more of them, and by two sufficient sureties (except in special cases, as mentioned in the foregoing Rule number three), in the penal sum of two thousand dollars; the condition of which bond shall be to the effect that the appellant or appellants shall and will effectually prosecute his and their appeal, and pay such costs and damages as shall be awarded in case the judgment or decree appealed from shall be affirmed, or in part affirmed; and in cases from Chancery, application to the Court of Appeal to stay proceedings shall be by motion and notice, which motion, if granted, shall be upon terms as to security, under the sixteenth section of the aforesaid statute, chapter thirteen, or otherwise, as the circumstances or nature of the case may require.

36.—That the bond referred to in the foregoing Rule number twenty-nine, [*Qu.* thirty-five] shall be in the following form:

Know all men by these presents, that we (naming all the obligors, with their places of residence and additions) are jointly and severally held and firmly bound unto (naming the obligees, with their places of residence and additions) in the penal sum of —— dollars, for which payment well and truly to be made we bind ourselves, and each of us by himself, our and each of our heirs, executors and administrators, respectively, firmly by these presents.

Witness our hands and seals respectively, the —— day of ———, in the year of our Lord 18—.

Whereas (the appellant) alleges, that in the giving of judgment in a certain suit in Her Majesty's Court of Error and Appeal, in Ontario, between (the respondent) and (the appellant), manifest error hath intervened; wherefore (the appellant) desires to appeal from the said judgment to Her Majesty, in Her Majesty's Privy Council.

Now the condition of this obligation is such, that if (the appellant) do and shall effectually prosecute such appeal, or pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed against shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise shall remain in full force.

37.—That in every case of appeal to Her Majesty in Council, the obligors, parties to any bond as sureties, shall justify their sufficiency by affidavit in the manner and to the same effect as is required by the foregoing rule number eight.

Wm. H. Draper, C. J., Appeal.
Wm. B. Richards, C. J.
John H. Hagarty, C. J. C. P.
Joseph C. Morrison, J.
O. Mowat, V. C.
John W. Gwynne, J.
Thomas Galt, J.
S. H. Strong, V. C.

SELECTIONS.

SIR EARDLEY WILMOT.

The retirement of Sir John Eardley Wilmot from the judgeship of the Marylebone County Court is an event that calls for comment. No judge was ever more respected, or ever better deserved the respect of the profession of the public. His ability and learning were conspicuous, and he was distinguished for the zealous dischage of his onerous duties. He retires because he is unable to attend to the business of Circuit 43, and the work that overtaxes the strength of Sir Eardley must surely try the powers and endurance of his learned successor.

The Marylebone district comprises a population of upwards of a quarter of a million. Sir Eardley, supported by memorials from the inhabitants, petitioned for a division of the Court, but the petition was disregarded; we suppose on the score of economy. Then he obtained the assistance of Mr. Abbott as deputy judge for one day in the week, but that course was not approved of; and, as Sir Eardley would not do injustice to the suitors by attempting to do more than his strength permitted, he resigned. We protest against the costly economy of the Government, but there is consolation in the case of Sir Eardley Wilmot. He is lost to the country as a County Court judge, but we apprehend that he will be of greater service as a law reformer, for which his talent, his learning, and his ripe judicial experience peculiarly fit him. His farewell address to the Court shows that he has well considered the subject. He proposes that the plaintiff should in any case have the option of of bringing his action in a County Court, and that when the case involved debt and damages above a certain amount, the defendant should have the power to remove to a Superior Court on giving security for costs. To this proposal we strongly object. When the case is of a certain importance the defendant has a right to a trial before a judge of a Superior Court, and to have a verdict of a superior jury.

Because a man is poor, that is no reason why he should put up with a trial in a County Court. Those who go to law must take the risk of the costs being paid in the event of success. Besides, if a man is too poor to pay costs, what is the use of suing him for a large debt or for heavy damages? The next suggestion we hold to be worthy of serious consideration. Sir Eardley proposes that civil and criminal business should be associated in the local Courts, the criminal business being such as is now dealt with by quarter sessions.

We regard it as most important that there should be no delay in the disposal of criminal business. Nothing is so deterrent as swift justice, and the wrongfully accused are entitled to a speedy trial. The next recommendation refers to the of the business in County Courts. Sir Eardley proposes that there shall be fixed days for the actions under £5, and cases above that amount and jury cases to be taken on other days. He remarks that with the present system counsel who attend County Courts frequently have to wait for hours and and then go away unheard. The cases in County Courts are now so important that the aid of counsal is indispensable, and it is monstrous that their time should be wasted whilst the Court is engaged in disposing of a long list of petty actions. Sir Eardley is of opinion that it would be advantageous to occasionally promote a County Court judge to a judgeship at Westminster Hall. Better men, he contends, would accept County Court judgeships if they knew that step was not a bar to further advancement. With this we agree, and for two reasons:—1. We require first-rate men for the County Courts, as in some respects their position is more difficult than that of a puisne judge. In a Superior Court the judge usually has the assistance of counsel, while in the County Court the judge has generally to do without that assistance. 2. If first-rate men took County Court judgeships, they would be well qualified for Westminster Hall. We do not mean, of course, that all the judges should be taken from the County Courts, and to carry out the plan there must be a system of promotion in County Court judgeships—*id est*, meritorious judges should be transferred from less to more important circuits. Sir Eardley says that he left Bristol for the London Court that he might not be debarred taking his small share in legal improvements. We hope, and indeed we are confident, that his retirement from the office of judge will enable him to render greater service in the much needed work of legal reform. —*The Law Journal.*

CARRIERS.

PASSENGERS' LUGGAGE.

Macrow v. *G. W. R. Co.*, Q.B., 19 W. R. 873.

The plaintiff, returning with his household from Canada to England, had among his luggage various articles of bedding, with which he intended to provide his new settlement, wherever it might be. The defendant, by whose line he travelled, lost his goods, and then he sued them for damages; and having on the trial recovered damages, from the calculation of which the bedding was (among other things) excluded, he obtained a rule to increase the damages by the value of the excluding articles.

After hearing the rule argued the Court took time to consider, and at length delivered a judgment in which an attempt is made to settle some general rule by which to determine what is "passengers' luggage." "Whatever," says Cockburn, C.J., delivering the judgment of the Court, "the passenger takes with him for his personal ease or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the

ultimate purpose of the journey, must be considered as personal luggage." Apparel for use or ornament, the sportmans's gun and fishing-rod, the artist's easel, and the student's book are mentioned as instances," and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying." "On the other hand, the term *ordinary luggage*, being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purpose of business, such as merchandise or the like, or for larger or *ulterior purposes*, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier." It is to be feared that notwithstanding this careful attempt at discrimination the question is not much nearer a settlement than it was before, and the case cannot be safely cited to prove anything except that bedding is not ordinary passengers's luggage. When the term is allowed to include what the passenger carries for *ultimate* purposes, but not what he carries for *ulterior* purposes, inasmuch as the superlative is larger than the comparative, it must be assumed that ultimate and ulterior are used with a different reference, and that by the latter term is signified something beyond any purpose, even an ultimate purpose, of the journey. But the ultimate purpose of the journey is something to be done after the journey is accomplished, and is thus distinguished from the necessities of the journey itself, and this is shown by the instances put; in fact, almost everything a passenger ever carries is carried for such purposes. But where these ultimate purposes end, and the purposes which are ulterior to them, and are therefore not purposes of the journey at all, begin, is far from clear.

The distinction might be drawn between a permanent settlement at the journey's end and a mere temporary sojourn, but this is not expressed in the judgment, although it would apparently suit the facts of the case. That distinction would not, however, apply to merchandise carried for sale, for there the sojourn is only intended to be temporary. It would be open also to this objection—that a passenger might recover for a loss, on his journey out, of that in respect of which he could not recover on his journey home; or if things originally taken out were held to retain their character on their way back, this would not apply to anything newly acquired and on the road to its destination. If, again, the test of *personal* use is applied, it is hard to say that a man does not as much personally use his bed as any article of clothing. And if it is said that the things must be such as people ordinarily carry, it was answered in this case that emigrants ordinarily do carry their bedding, and emigrants are just as much a class as artists or sportsmen. It is not therefore easy to see that this case has really contributed to the solution of the vexed question, What is passengers' luggage? and we cannot help entertaining a doubt whether the case was rightly decided, whether the true application of the test personal use would not have given the plaintiff his damages, and whether the test of ulterior and ultimate purposes was not an entirely false and impossible ground of distinctonn. It may at first sight appear that the qualification, " the taking of which has arisen from the fact of his journeying," gives some assistance; but on examination the test will be found to fail, for if it means anything to the purpose it must mean that the traveller takes the things for the sake of the journey, and does not take the journey for the sake of the things. But though this would exclude merchandise carried for sale, it would equally exclude many other things which are certainly included in passengers' luggage and most of the things mentioned as such in the judgment; indeed, it would exclude everything not required by the fact of moving about from place to place. If, on the other hand, it only means that the journey must form the occasion or create the necessity of taking them, then certainly the plaintiff's goods would have fallen within the description, would in fact be as wide as any passenger could desire.—*The Solicitors' Journal.*

FREIGHT IN ADVANCE.

We may be inclined in our hearts to sneer at the law of the Medes and Persians, "which altereth not," but we must remember that there is no evidence whatever that the judges of the Medes and Persians thought the particular law bad and deserving of amendment.

Our Courts go far beyond these immutable orientals. What can we say, when arraigned by the "intelligent foreign jurist," in defence of the Court of Exchequer Chamber in the case of *Bryne* v. *Schiller*, which has already called forth comment and rebuke, but which becomes more acutely aggravating when we sit down calmly to read the report of it in the current number of our Reports (40 Law J. Rep. (N.S.) Exch. 177). "Held," says the headnote, "that a payment in advance on account of freight cannot be recovered, even though the voyage fail." "That," says the Lord Chief Justice, "is settled by the authorities."

It is exactly contrary to the law of all other European nations; and even across the Atlantic, where people make up for contempt of all things old by excessive veneration of the common law, the Courts have discarded our rule, and have decided that a payment of freight in advance must be repaid if not earned. The Lord Chief Justice regrets our rule, thinking it founded upon an erroneous principle, and anything but satisfactory. Mr. Justice Byles says that the current of authority is too strong even for the House of Lords to resist. Mr. Justice Keating says that it is unfortunate that we should be left out in the cold, but there is

the law, and it ought not to be shaken"; and Mr. Justice Lush winds up the argument by declaring that it is highly important that a rule of commericial law, established so long as the one in question, should be adhered to. After all we are only dealing with the foreign tribunals as the immortal recruit did with his brethren in the militia:—"Bill," said the squad," you are out of step." "Well," replied Bill," then change yours."—*The Law Journal.*

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

COUNTY OF GREY (SOUTH RIDING) ELECTION PETITION.

HUNTER, *Petitioner*, *v.* LAUDER, *Respondent.*

(Reported for the Canada Law Journal by C. A. BROUGH, *Barrister-at-Law.)*

Controverted Elections Acts—Adjournment—Power of judge to change place of hearing—Evidence of bribery—Responsibility for acts of agents and sub-agents—Payment of expenses of voter—Treating—Destroying election accounts.

When a rule of Court has been granted in pursuance of 34 Vic., cap. 3, sec. 14, appointing a place for the trial, not within the Division, the election for which is in question, the judge by whom the petition is being tried has no power to adjourn, for the further hearing of the cause, from the place named in the Rule of Court to a place within such division.

Where a charge of bribery is only the unaccepted offer of a bribe, the evidence must be more exact than that required to prove a bribe actually given or accepted.

The Respondent entrusted about $700 to an agent for election purposes without having supervised the expenditure. *Held:* that this did not make him *personally* a party within 34 Vict. cap. 3, sec. 46, to every illegal application of the money by the agent, or by those who received money from him. But if a very excessive sum had been so entrusted to the agent, the argument of a corrupt purpose might have been reasonable.

When a candidate puts money into the hands of his agent, and exercises no supervision over the way in which the agent is spending that money, but accredits and trusts him, and leaves him the power of spending the money although he may have given directions that none of the money should be improperly spent, there is such an agency established that the candidate is liable to the fullest extent, not only for what that agent may do, but also for what all the people whom that agent employs may do.

The payment of a voter's expenses in going to the poll is illegal, as such, even though the payment may not have been intended as a bribe.

The distribution of liquor on the polling day, with the object of promoting the election of a candidate, will make his election void.

When all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the case be stripped of all other circumstances, the strongest conclusions will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct.

Where bribery by an agent is proved, costs follow the event, even though personal charges made against the respondent have not been proved, there having been no additional expense occasioned to the respondent by such personal charges.

[Owen Sound—Sept. 12, 13, 14, and Nov. 7, 8, 1871—*Mowat, V. C.*]

The petition in this case was presented by Alexander Hunter, a voter at the election, against the return of Abraham William Lauder.

By virtue of a rule of the Court of Queen's Bench, the case came on for hearing at Owen Sound, a place not within the electoral division, in September, but owing to the absence of a material witness was adjourned until November. Upon the adjournment the question was raised whether the presiding judge could adjourn from Owen Sound to a place within the electoral division, for the further hearing of the case. But the learned Vice-Chancellor decided that he had no power to grant such an adjournment, as by so doing he would in effect override a rule of court.

It was alleged in the petition (amongst other things) that corrupt practices within the meaning of section 46 of "The Controverted Elections Act of 1871," 34 Vic. cap. 3, had been committed by and with the knowledge and consent of the respondent himself, and also by his agents.

The corrupt practices with which Mr. Lauder, the respondent, was personally charged, were direct offers of bribes. and treating meetings of electors.

The offers of bribes were said to have been made to one Alexander McKechnie and one James Black, who were examined as witnesses. The evidence of both was contradicted by Mr. Lauder on his own oath. McKechnie had actively supported the respondent at the previous election for the riding, and Mr. Lauder seemed to have expected a like support from him at the election now in question. In this expectation Mr. Lauder (according to McKechnie's evidence) asked him to "come into our committee to-night," and added, "we'll furnish you with plenty of means." McKechnie did not go to the committee, and did not give Mr. Lauder his support. He deposed that he considered Mr. Lauder's observation "in the light of bribing" him.

James Black deposed that he had heard that Mr. Lauder had a large sum of money to spend on the election; that he applied to Mr. Lauder for some of it; that he offered to work, if paid; and that he (the witness) said that money would "do good" in his section; but he also deposed that Mr Lauder would not give him any money; said it would be illegal to do so, and made him no offer. The witness added that Mr. Lauder told him to "go to Perry." He stated that he did go to Mr. Perry, and that Mr. Perry said he had no money. And it further appeared that the witness in fact got no money either from Mr. Lauder or from Mr. Perry, and that he in consequence voted for Mr. McFayden, the opposing candidate.

As to the treating, it was proved that on various occasions Mr. Lauder expressly forbade all treating, as well as everything else of an illegal kind being done to promote his election. But it appeared that on the nomination day, at a meeting held after the nomination, in the Orange Hall in the village of Durham, refreshments were brought into the room by one Woodland, and were partaken of by the persons present. Mr. Lauder deposed that he knew nothing of these refreshments before they were brought in; that he told the parties bringing them in to be careful, and that they might be "coming too near the law." He further deposed that he did not pay for these refreshments, and that no account for them had been rendered to him. There was no evidence to the contrary of what Mr. Lauder thus deposed. There was, however, evidence that he did pay for refreshments provided for various committees at their business

meetings. The central committee at Durham consisted of about nine persons; the local committees did not seem to have respectively comprised so many. There was evidence, also, that on some other occasions there was a general treating of electors at the close of public meetings of electors, which Mr. Lauder had been addressing, and while he was in the house where the treating took place. There was no other evidence of knowledge or consent. One Thomas Smith swore that after a meeting held at a tavern in Egremont, which meeting had been addressed by Mr. Lauder, he had given a treat for which he paid $5; that some time after the treat he received $20 from Mr. Lauder; that he had paid the $5 at the time the treat was given, and before he received the $20; and that the treat was given on his own responsibility, and Mr. Lauder was no party to it; that Mr. Lauder gave the $20 to pay for the use of the room in which the meeting was held, for his (Mr. Lauder's) own personal expenses at the tavern, and for refreshments which had been furnished for a committee which held a meeting at the tavern that evening. It was not shown that Mr Lauder was aware that Smith had treated when he gave him the $20. Smith also swore that he had expended more than $20 for refreshments for committee-men, for feed for their horses, &c., in addition to the $5 paid for the treat.

The corrupt practices said to have been committed by Mr. Lauder's agents were chiefly these: 1. bribery; 2 treating meetings of electars; and 3. giving spirituous drinks during the polling day.

In regard to bribery, the principal instances proved were committed by one George Privat. Privat was the principal canvasser for Mr. Lauder in that part of the township of Normanby called the "Old Survey." Privat was called on by one William Scott and one Charles Grant, and was either asked to go on the committee (for securing Mr. Lauder's election), or was told by Scott that he had been put on the committee. The former was his own recollection, the latter was Grant's recollection of what had occurred. He sent word to Durham by these persons "that it would take $100 to work up the Old Survey." In reply, he was told that so much could not be given He was told also to go to one Meddaugh, whom he knew. He went to Meddaugh accordingly, and at Meddaugh's instance Mr. Perry gave him $50. Privat "was not told what he was to do with the money," but he received it "to spend on the election." He went into the canvass, and in the course of it he committed the alleged acts of bribery.

The alleged bribery was this: it appeared from his own evidence that after conversing with certain named voters severally, a day or two before the election, he dropped money for them on the ground, and then walked away; that in each case he meant this money to be picked up by the voter; that his chief or only purpose in this was to secure the voters' support for Mr. Lauder; and that he dropped the money instead of handing it to the voter, because he imagined that this indirect mode would enable the voter, if sworn, to say that he had received no money Meddaugh, to whom he referred Privat as to money, was another member of the central committee. Perry, who gave Privat the money, was a distant relation of Mr. Lauder's; he was the secretary of the central committee; kept all accounts; was the treasurer for the contest, and received from Mr. Lauder, and disbursed most of the funds which Mr. Lauder from time to time supplied for the purposes of the election. Mr. Lauder stated in his evidence that he had "refused to have anything to do with committees." The only instructions which he appeared to have given with reference to the expenditure of the money were those implied in his forbidding any treating, hiring of teams, or paying for votes. Two of these voters were examined, and proved the finding of the money which Privat had dropped. Privat stated that he had some talk with the voters referred to about their doing some ploughing for him.

The Vice-Chancellor considered that if this part of his evidence were correct, the suggestion about ploughing was, like the dropping of the money, a colourable pretence by which it was proposed to evade the law.

William Scott, who solicited Privat to take part in the active work of the election, was a member of the central committee. He "went round to the different places and brought in returns, sometimes written and sometimes verbal, of how the other committees were getting on."

Mr. Perry paid out about $1700 for the purposes of the election, and after the election he claimed credit for that amount from Mr Lauder. Mr. Lauder allowed and settled $625 only, but objected to the balance as unnecessarily spent (not, he said, as illegally spent), and had not yet paid it. Perry swore that he, notwithstanding, expected to be paid, though he had not yet received any promise to that effect.

It appeared that the letters and accounts with reference to the election had been destroyed. Mr. Lauder stated that he had destroyed all the letters written to him, and had kept no copies of the letters written by him, in which reference was made to money matters; and Perry swore that he had destroyed all papers connected with the election about ten days after it took place, including a list of the members of the central committee, a record of their proceedings, and an account of moneys expended.

It is thought unnecessary to state the evidence on points involving no question of law, or no question upon which the Vice-Chancellor in giving judgment expressed an opinion.

J. K. Kerr appeared for the petitioner.

The Respondent appeared in person.

Mowat, V. C.—I am satisfied that no case has been made out against Mr. Lauder personally.

With regard to the Orange Hall meeting, the weight of evidence goes to show that it was a meeting of committees; and besides, no refreshments for the meeting were ordered or furnished by Mr. Lauder, or paid for, or promised to be paid for, by him. I do not think that reasonable refreshments furnished *bona fide* to committees are illegal.

As to the alleged treating at Normanby, Smith's evidence is unsatisfactory, but there is no ground for believing that Mr. Lauder knew that Smith had treated when he gave him the money.

The case of McKechnie, as stated by himself, is not sufficient to prove Mr. Lauder guilty. McKechnie states that Mr. Lauder said, "come over to our committee to-night, and you shall be furnished with plenty of means," and McKechnie swears that he considered this an offer of a bribe to him. He did not go to the meeting, and no other conversation on this point took place. Now, where the charge is only the unaccepted offer of a bribe, the evidence must be more exact than is required to prove a bribe actually given or accepted. A very little difference in the language employed might make a great difference in the intention of the supposed offer. Where a conversation is not followed by the act spoken of, we are not, unnecessarily, to presume a bad intention. In an election, means are required for legitimate purposes; and I am not at liberty to infer that Mr. Lauder meant "I shall furnish you with plenty of means for illegal purposes."

The case of Black is weaker than that of McKechnie. He says—"I heard Mr. Lauder had a large amount of money for election purposes, and I asked him for some He refused it, and said it was illegal, and told me to go to Perry." Black applied to Perry, and Perry neither gave him money nor a promise of any. It would be preposterous to say judicially on this evidence that Mr. Lauder or Mr. Perry offered or promised to give the money which they both refused to give. Both McKechnie and Black voted against Mr. Lauder.

Next it is said that Mr. Lauder entrusted large sums to Perry: that he should have supervised the expenditure, and that his failure to do so makes him personally a party within section 46 of the Act of 1871 (34 Vic. c. 3), to every illegal application of money by Perry or by those who received money from Perry. The sum which Mr. Lauder gave was under $700; there is no evidence before me that that sum was an excessive one for legitimate expenses; and a certain amount of discretion must be placed in a candidate's agents. If he had put £7000 into Perry's hands, the argument of a corrupt purpose might have been reasonable. The facts do not suggest to my mind any idea that Mr. Lauder intended his money to be employed illegally.

For these reasons I think the personal charges not made out.

The Respondent then addressed the court as to bribery by agents.

Mowat, V. C.—I may dispose of this case on the ground of the illegality of Privat's acts. He was asked by Scott to assist in the canvass, and was referred to Durham for money. He went there, and got the money from Perry, through the intervention of Meddaugh. These three persons were the members of, or connected with the committee at Durham. Mr. Lauder argues that it does not appear that Perry paid the money with the concurrence of the committee; but there is no evidence that Mr. Lauder had said or done anything to create a necessity for this concurrence, and there is evidence to the contrary. Perry received no instructions as to the mode of the distribution of the money. That was left to his discretion; and Mr. Lauder in his evidence distinctly repudiated all committees, and stated that he had made his payments through Perry. But even if Perry had been directed to carry out the instructions of the committee, and had disobeyed, he being the treasurer for the election, the secretary of the committee, and the confidential agent of the candidate, his acts would still bind the candidate. This is laid down in the *Staleybridge case*, 1 O'M. & H. 69. There Mr. Justice Willes said:—"I have already in the *Bewdley case* (*Ib.* 18). had occasion to decide this much. There it appeared that the sitting member had put a sum of money into the hands of his agent, and that he exercised no supervision over the way in which that agent was spending that money; that he had given him directions, and I thought really intended, that none of that money should be improperly spent; but that he had accredited and trusted his agent, and left him the power of spending the money, and I came to the conclusion upon that, that there was such an agency established as that the sitting member was responsible to the fullest extent, not only for what that agent might do, but for what all the people whom that agent employed might do: in short, making that agent, as far as that matter was concerned, himself, and being responsible for his acts. I see no reason to doubt at all that that is perfectly correct."

This is no new law: it has been the rule ever since there was a record of the law of Parliament; it is founded on reason, and if another rule were adopted, a candidate might give his agent money, take the benefit of the expenditure, and afterwards say that he did not authorize the mode in which the money had been spent, claim freedom from responsibility in respect of the use made of it, and thus evade the whole law against corrupt practices. I cannot hold otherwise in this instance (in which there is no dispute as to the facts), than that Mr. Lauder is responsible for the acts of Privat.

As to these acts: Privat talked to certain voters about the election, and dropped the money for them, so (as he explains it) that they might be able to swear that they had received no money. To constitute the offence, it is not necessary that voters should accept an offered bribe. The two voters called confirm all that was necessary in Privat's evidence to make out the charge against him. His purpose was to secure the votes by means of this money. I have no alternative but to hold that Privat has been guilty of such acts as agent as render the election void.

So far the case is free from doubt.

As to some other points, it may be proper that, for the information of parties concerned, I should intimate the impression I have formed

As to Ray, I do not consider the $2 given to him to have been a bribe, as distinguished from a payment for the expenses of himself and the other voters who were going with him to the polls; but the payment would be illegal either way, according to the decision of Chief Justice Richards at Picton, and of my brother Strong at Barrie.

As to the treating by agents of meetings of electors, in order to promote the election, if the validity of the election had in my view depended on that question, I would, in consequence of the decision in the *Glengarry case*, have reserved the point for the opinion of the Court of Queen's Bench.

If it had been necessary for me to decide as to the effect of distributing liquor on the polling day, I do not at present see how I could avoid holding that the object was the promotion of the election of Mr. Lauder, and that the election was void on that ground.

With regard to the destruction of the accounts and papers, I consider the matter a very grave one. If the case were stripped of all other circumstances but the destruction of the records of the committee and the accounts, by a person holding the position of Mr. Perry in the election, I incline at present to think that it would be my duty to draw the strongest possible conclusions against the respondent; and that I should make every presumption against the legality of the acts which were concealed by such conduct. The only safe course for an honest candidate to pursue, is to have all papers preserved, and to be able to show how all the money was expended. For such a candidate, or any agent of his, to be content with saying he does not know how the money is spent, is very unwise.

But I pronounce no decision on these points, as the conduct of Privat has rendered it unnecessary. On the ground of Privat's acts I declare the election void, and I shall report that it was not established to my satisfaction that corrupt acts were committed by or with the knowledge of Mr. Lauder personally.

The English practice is that costs follow the event where bribery by an agent is proved, and I follow that practice.*

The respondent then urged that there should be an apportionment of the costs, as, according to the judgment of the court, the petitioner had been successful on some only of the issues.

Mowat, V. C, said that there did not appear to have been any increase of the costs on account of the issues on which the petitioner had failed; that his observations as to the destruction of papers were to be borne in mind, and that, under all the circumstances, he did not think there should be any apportionment.

WEST TORONTO ELECTION PETITION.

Armstrong, *Petitioner*, v. **Crooks**, *Respondent.*

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Controverted Elections Act—Particulars.

Where particulars of alleged corrupt practices, &c., have been delivered under an order for that purpose, better particulars will not be ordered, if those delivered substantially comply with the spirit of the order by giving all reasonable information.

Nor will better particulars be ordered, even when the order is not complied with in furnishing certain detail, provided the judge to whom the application is made thinks these details unnecessary or unreasonable, nor unless the respondent can shew on affidavit that the want of such information will prejudice him in his defence.

Semble, that the powers of the judge at the trial as to amendment of the petition, and particulars, and postponement of the trial should be liberally exercised so as to prevent a failure of justice to either party.

[Chambers, July 12, 1871.—*Richards, C. J.; Hagarty, C. J., C. P.; Morrison, J.*, and *Mowat, V. C.*, Judges on the *rota.*]

Cattanach, for the respondent, obtained a summons calling on the petitioner to show cause why he should not give better and fuller particulars of the charges contained in the petition, and directed to be given by a judge's order in that behalf.

Harrison, Q C., shewed cause.

The particulars furnished are sufficient, and at least are the best we can give. The information must be obtained from those opposed to us, and we cannot be reasonably asked for more. The order for particulars was too strict in its terms, but we have complied with the spirit of it by giving all reasonable information.

Cattanach, *contra*.

The particulars furnished do not comply with the order made; and though the cause now shewn might have applied to the application for the order in the first instance, it is not an answer to the present application: *Bristol Case*, 22 L. T. Rep., N.S. 729, and a note of *Nottingham Case*, in 47 L. T. 241. [Richards, C. J., and Hagarty, C. J., C. P.—We will not hold parties rigorously to orders made, unless injustice will be done. We have not acted in the view you contend for; and if the order is too strict, can we not re-mould it now?] The order as made must be followed, and the particulars ask very explicit answers, which are not complied with. [Counsel read the order and particulars, pointing out where the latter were in his opinion defective. Mowat, V. C. — It really makes no matter, as the evidence would be heard by the judge who may try the case. Richards, C. J.—Admitting that the original order is more strict than we now think it should have been, the question is now whether you have not got all the particulars you can reasonably ask. We will carry out spirit of the Act and rules, without regard to technicalities. Hagarty, C. J. C. P.—Many of these orders were made before any practice was settled in this country in relation to them.] The practice in England and Ireland is in favour of our contention. See *Bradford Case*, 19 L. T. Rep. N. S. 723, 728, and the cases there referred to.

Richards, C. J. — We will not defeat enquiries on any technical grounds, and we are not prepared to make any further order unless Mr. Crooks can shew by affidavit that he will be prejudiced; nor do we think he will be prejudiced. If, at the trial, the contrary is shewn, the trial can be postponed, and there can be little difficulty or expense in a city case: in a case tried in a country place, there might be some difference in this respect. If the particulars delivered are in reasonable compliance with the spirit of the order—and we think they are—we must hold that the order has been sufficiently complied with.

Summons discharged.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.]*

Armstrong v. Montgomery.

Security for costs—Ejectment Act, sec. 76.

Held, that the mere fact of a second action of ejectment being brought between same parties and for the same land, is no reason for ordering security for costs, if the costs of the first action have been paid, and the second action brought in good faith.

[Chambers, Sept. 18, 1871—*Mr. Dalton.*]

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* See *Norwich case*, 1 O'M. and H. 11; *Bewdley case*, *Ib.* 21; *Ib.* 34; *Bridgewater case*, *Ib.* 116; *Dublin case*, *Ib.* 273; *Sligo case*, *Ib.* 302.—Eds. C. L. J.

Ejectment. The plaintiff had brought a former action of ejectment against the same defendant for the recovery of the same premises, but failed, owing, as he alleged, to some defect in the evidence then adduced. Having paid the costs of the former action, he commenced the present one, claiming under two additional modes of title.

The defendant applied under sec. 76 of the Ejectment Act for security for costs.

Osler shewed cause. This case does not come within the Act, and in the discretion of the judge security should not be ordered. There is no pretence that this second action is vexatious.

Mr. Strathy (Cameron & McMichael), *contra*, relied on Con. Stat, U. C. cap. 27, sec. 76.

Mr. Dalton.—I do not find any authority for saying that the mere fact of an action of ejectment being brought after a previous unsuccessful one between the same parties, is a reason for ordering security for costs, when the costs of the first action have been paid; and I cannot see any cause for it when there is no reason to suppose that the second action is otherwise than in good faith to assert the plaintiff's right to the land.

Summons discharged.

Colville v. Johnston.

C. L. P. Act, secs. 184, 188—Right to cross-examine.

On an examination of a witness, under C. L. P. Act, secs. 184, 188, his evidence will not be read if the right of cross-examination has been denied.

[Chambers, Sept. 18, 1871.—*Mr. Dalton.*]

It was charged, in this suit, that there was a collusive settlement between the parties to deprive the attorney for the plaintiff of his costs; and the plaintiff asked for an order on the defendant for his costs, &c.

The plaintiff's attorney, desiring to obtain, for the purposes of this application, the evidence of a witness who refused to make an affidavit of certain facts, had him examined under an order obtained pursuant to C. L. P. Act, secs. 184, 188. After the witness had been examined in chief, the defendant expressed his desire to cross-examine him; whereupon the plaintiff's attorney objected, on the ground that there was no right of cross-examination in such a case; and the objection was upheld by the County Judge before whom the examination was held.

The report of this examination being tendered as evidence on the present application,

Spencer, for the defendant, objected to it on the ground that the defendant had not been allowed to cross-examine the witness.

Holmested, contra.

Mr. Dalton.—I must decline to read this evidence for the reason given. I think the defendant had a right to cross-examine the witness, and I cannot read the evidence until he has had an opportunity of doing so.

Yeoman v. Chesley B. Steiner and Anson Steiner.

Jurat—Style of Cause—Irregularity.

A jurat stating the affidavit to have been sworn "at Toronto," without giving the name of a county, *held* sufficient.

Where in ejectment a landlord is allowed to come in and defend, the order not saying whether it is instead of, or as well as, the original defendant, it is irregular to omit the name of the latter.

[Chambers, October 28, 1871.—*Mr. Dalton.*]

Ejectment against Chesley B. Steiner. Anson Steiner was allowed by judge's order to appear to the action, as landlord of the present defendant, and to defend for the property claimed.

The plaintiff gave notice of trial, but the style of cause in the notice made no mention of the original defendant, Chesley B. Steiner. On this ground a summons was obtained to set it aside as irregular.

Mr. Ermatinger (Read & Keefer) shewed cause, and made a preliminary objection to the affidavit on which the motion was based, in that the jurat was defective in not stating the county where the oath was taken. The jurat was as follows: "Sworn before me at Toronto, this 26th October, 1871. Samuel B. Clark, a Commissioner, &c."

As to the alleged irregularity in the notice of trial, he cited *D'Arcy* v. *White*, 24 U C. Q. B. 570; *Peebles et al.* v. *Lottridge et al.* 19 U. C. Q. B 628.

Spencer, contra. As to the form of the jurat it is a common practice to draw them in the same form as this one. For all that appears it may be Toronto township that is meant, and the township would be judicially recognised.

The notice of trial is irregular on the authority of *Haskins* v. *Cannon et al*, 2 Prac. Rep. 334; *Jones* v. *Seaton*, 26 U. C. Q. B. 166. It will be presumed that the name of the tenant was intended to be retained as a defendant.

J. K. Kerr, amicus curiæ. A jurat similar to the one under discussion was used in an affidavit in the case of *Gray* v. *Brown* (not reported), and was objected to on the same ground, but after full argument it was held sufficient by the Court of Common Pleas.

Mr. Dalton.—As to the first objection, though the point seems arguable, I must hold the affidavit regular; but the notice of trial is irregular in not giving the names of both defendants, and must be set aside with costs.

Order accordingly.

CHANCERY.

In re A. B., a Solicitor.

Practice on solicitor and client taxations.

If charges in a solicitor's bill of costs are unusual or exceptional he has to make out a very clear case to have them allowed.

If the usual charges are made, but the client complains of negligence or unskilfulness, not apparent in the face of the bill, then the *onus* rests in him to establish his case.

[Master's Office, Dec. 4, 1871.—*Mr. Boyd.*]

The question discussed in this case was upon whom the *onus* of proof rested in the course of proceedings for the taxation of a solicitor's bill. Nothing turned upon the facts farther than appears in the judgment.

Mr. Foster, for the client, cited *Allison* v. *Rayner*, 7 B. & B 441.

Mr. Bain, for the solicitor.

The Master.—In a reference to tax a bill of costs between a solicitor and his client, the Master in Chancery has special jurisdiction to determine questions of disputed retainer, and

of alleged negligence or unskilfulness on the part of the attorney, with a view to the total or partial disallowance of the bill, or of classes of items in the bill; matters which at common law are disposed of at Nisi Prius before a reference to taxation is had. He has also the usual jurisdiction common to the taxing affairs of all courts, of moderating the charges made, and of disallowing the costs of proceedings which in his judgment are unnecessary or altogether inapplicable and unproductive: see *Marshall*, pp 229, 230

In my opinion, when a bill of costs is brought into this office for taxation, it will be proper first to ascertain the matters which the client disputes in the bill, and for this purpose that he be directed, by underwriting in the warrant, to file and serve a notice containing his several objections some days before the taxation is to be proceeded with. The solicitor and the Master will thus know what are the issues raised, and the proceedings will be regulated accordingly. If the objections are merely to the rate of charge, which can be disposed of as the account is gone through with, and vouched item by item by the taxing officer, then that stage of the proceedings may be at once entered upon, and the bill moderated and taxed as in ordinary cases. But if the objections served dispute the retainer, and set up conduct in the solicitor which may disentitle him to the whole bill, or to any group of items, or to any particular proceeding severable from the rest of the bill, then until the principles are settled on which the bill is to be taxed, it seems needless to vouch the bill, as has been done in the present case. These objections should be first dealt with, evidence given thereupon, and the ruling of the Master had, before the item by item work is commenced. When the solicitor sees what issues are raised, it will be for him to establish his claim, or to call upon the client to make out his case of negligence or otherwise, so as to warrant the disallowance of the objectionable items. The *onus* of proof will depend altogether on the nature of the objections. Under ordinary circumstances, the attorney suing at law when there are no special pleas, gets a verdict on his bill of costs upon proving the retainer, and that the work charged for was done.

The case of *Allison* v. *Rayner* 7 B. & C. 441, is an exceptional one in this respect; but is explained by the fact that the costs in question had been incurred in a suit which not only failed, but proved utterly useless to the client, by reason of the attorney failing to take certain preliminary steps which were essential to the maintenance of that suit. In other words, it appeared upon the face of the bill of costs that the action had been improperly instituted (see *Gill* v. *Lougher*, 1 Tyr. 125), and it lay upon the attorney to give affirmative evidence to account for this to the satisfaction of the Court: see the report of the case in 1 M & Ry. Substantially the same principle is laid down in *Re Pender*, 10 B. 390, where the M. R. says: "When a solicitor makes any charge against his client not authorised in the usual and regular mode of procedure, the burden of proof is upon the solicitor." And also in *Re Smith*, 2 D. & L. 879, where Pollock, C.B., says: "It will be the duty of the Master, when unusual directions are alleged to have been given [by the client to the attorney] very strictly to inquire into the circumstances, and to have them proved by the most satisfactory evidence, so as to leave no doubt in his mind that the client was duly informed that he would recover none of the costs from the opposite party, and that with full knowledge of that fact he required the additional assistance for which the charge is made."

If upon the face of the bill of costs the charges or the proceedings complained of appear to be unusual or exceptional, it lies upon the solicitor to explain or justify them: if nothing of the kind appears on the face of the bill, the client should give some evidence shewing that the proceedings he objects to pay for were utterly useless, or unskilfully and carelessly managed, or failed entirely through the negligence of the solicitor, or have been needlessly incurred by his want of caution, or by his inexperience, or inadvertence, in the same way as he would have to do at Nisi Prius.

These remarks indicate the general rules to be observed in proceeding upon the objections to a bill of costs, though by the terms of the order of reference, great discretionary powers are vested in the Master, who can call for such kind of evidence, and at such times as he deems desirable, in order to satisfy his own mind as to the points in contest.

In the present case, I find, that the solicitor has not, in fact, closed his case upon the bill—though the greater part of the bill has been vouched—so that it becomes unnecessary for me to go through the objections *seriatim*, and rule as to the *onus* of proof upon each. Mr. Bain is now entitled to proceed with his evidence, and close his case, and he can, as of right, give such evidence as he deems necessary to support his right to the bill of costs as brought in.

The costs of the former day will abide the result of the taxation, as costs of the reference.

ENGLISH REPORTS.

COMMON PLEAS.

Oppenheim, Appellant, v. White Lion Hotel Company (Limited) Respondents.

Inn, money lost by guest at—Evidence of negligence of guest—Leaving bed-room door unlocked.

Plaintiff, a guest at defendant's inn, went to bed, leaving a bag containing about £27 in his trousers' pocket. He left his trousers on the ground at the side of his bed furthest from the door. There was a key in the lock of the door, but plaintiff only shut the door, and did not lock it. Plaintiff had previously pulled the bag containing the money out of his pocket in the commercial room for the purpose of paying somebody some money. In the course of the night, somebody entered plaintiff's bedroom through the door, and stole plaintiff's bag of money:

Held, that there was evidence to go to the jury of negligence on the part of the plaintiff, which occasioned the loss in such a way that it would not have happened if plaintiff had used the care that a prudent man might reasonably be expected to have taken under the circumstances.

[25 L. T. N. S. 93.]

On appeal from the ruling of the judge of the County Court at Bristol, the following case was stated:

1. This is an action brought against the de-

fendants, who keep a common inn for the accommodation of travellers, to recover for the loss by the plaintiff when a guest therein of £27. The case came on on the 13th December, 1870. The following are the particulars annexed to the summons:

In the County Court of Gloucestershire, holden at Bristol.

Between Samuel Oppenheim, plaintiff, v. The White Lion Hotel Co. (Limited), defendants.

The plaintiff sues the defendants for that the said defendants, being innkeepers, the said plaintiff, on the 31st August last, became and was the guest of the defendants for reward to be paid by the plaintiff to the defendants, and it thereupon became and was the duty of the defendants to provide the plaintiff with a safe and properly secured apartment for the reception and safe keeping of himself and his moneys and other personal belongings; yet the defendants did not provide a safe and properly secured apartment for the purpose aforesaid, and did not properly secure the personal belongings of the plaintiff, but were so negligent in the premises, and so wrongfully and negligently acted as such innkeepers as aforesaid, that the plaintiff as such guest as aforesaid became dispossessed and deprived and lost the benefit of certain property, to wit, a bag containing £22 6s., and was and is greatly damnified in and about the said premises. And the plaintiff also sues the defendants for that the defendants, on the day aforesaid, wrongfully converted to their own use and deprived the plaintiff of the possession of certain property of the plaintiff, to wit, the said bag of money And the plaintiff also sues the defendants for that the defendants contracted and agreed with and promised to the plaintiff that, in consideration of his becoming their guest for reward as aforesaid, they would indemnify and repay, or reimburse him for any money or other property which he might lose, or of which he might otherwise be deprived whilst their guest as aforesaid. And the plaintiff thereupon became and continued a guest for reward of the defendants, but the defendants did not keep and perform their said agreement and promise, but broke the same to the injury of the plaintiff as aforesaid. And the plaintiff claims £27.

Dated the 3rd November, 1870.

2. The plaintiff is a manufacturer and general merchant, carrying on his business in London. The defendants carry on the business of common innkeepers, in Broad-street, in the city of Bristol.

3. The plaintiff, who occasionally travels for the purpose of his business, had for eleven years before the commencement of this action, when he happened to be in Bristol, resorted to the inn called the White Lion Hotel, kept by the defendants when the cause of action arose.

4. On the 31st August, 1870, the plaintiff came to Bristol, and went alone to the defendants' inn (the White Lion Hotel). He arrived at about eleven o'clock in the evening, was received as a traveller, and, upon his request, a bed room for the night was appropriated for his use. The plaintiff having deposited his portmanteau in the hotel, went into the commercial room, where he remained till about twelve o'clock, when he proceeded to his bedroom.

5. When the plaintiff arrived at the defendants' inn he had with him a canvas bag, containing £22 and some odd shillings in money, and a half of a £5 note, such bag with its contents being in the pocket of his trousers which he then wore.

6. When in the commercial room the plaintiff did not exhibit his money, nor mention to any one that he had any money in his possession, but about five minutes before he went to his bedroom he took out the canvas bag from his pocket, and took sixpence from it to pay for some postage stamps. He then replaced the bag in his pocket.

7. The plaintiff was shown to his bedroom by the chambermaid, who remarked to him that the window of his bedroom was open, to which he replied that he always slept with his window open.

8. The plaintiff's bedroom was on an upper storey of the defendant's premises. The window opened on to a balcony into which two other rooms of the inn looked.

9. The door of the bedroom had attached to the inside of it a bolt and a lock with a key in it, both in good order and repair.

10. After the plaintiff came to his bed room he closed the door, proceeded to undress, and placed his trousers, in the pocket of which the bag containing the money then was, on a chair by the side of his bed, on that side furthest from the door, and in such a position that any one entering the room would have had to have gone round the bed to get to the chair.

11. The plaintiff then went to bed without having locked or bolted the door of the room, the door remaining shut.

12. There was no notice in the plaintiff's room requiring guests to lock or bolt the doors, nor had the plaintiff seen any such notice in any part of the defendant's inn, nor was he told by any of the defendants' servants that guests were required or advised to lock or bolt the doors. The plaintiff, in giving his evidence, stated that he was generally in the habit of locking his bed room doors when sleeping in an inn, but he had not done so on the occasion in question.

13 The plaintiff got up at seven o'clock the next morning. The door of the room was then shut.

14. The plaintiff then saw lying on the floor of his room some bits of paper and a small toy sample (which had been in the trousers' pocket in which the money was). The pocket of the trousers was turned half in and half out, and the bag with the money contained therein was not in the pocket nor to be found in the room.

15. As soon as the plaintiff discovered his loss he asked to see the manager of the hotel, but was told that he could not see him till between eight and nine o'clock. The plaintiff remained in his room till that time, when he went down stairs, saw the manager, and told him he had been robbed of his money. The manager then went up into the plaintiff's room and inspected it, and also the adjoining rooms.

16. The manager sent for two detectives, who, upon their arrival, examined the bed room in which the plaintiff slept, and the doors and windows, and the balcony on which the latter looked.

17. At the hearing of this case it was proved or admitted that the plaintiff had in his possession £27 in money and a note, contained in a bag which was in the pocket of his trousers when he retired to bed; that some person had during the night stolen such bag containing the money; that such person could not possibly have entered by means of the window of the bed room; and that the robbery could only have been effected by a person entering the plaintiff's bed room by the door.

18. It was upon these facts contended on behalf of the defendants that the plaintiff, in neglecting to lock or bolt his door, was guilty of negligence, so as to exonerate the defendants from their liability as innkeepers, to make good the loss incurred by plaintiff.

19. No witnesses were called on behalf of the defendants.

20. The case was tried by a jury, and the judge of the County Court, in summing up the case, after referring to the facts of the case, and explaining the law as regards the liability of innkeepers for the safe custody of the property of their guests, proceeded to direct the jury that the question they would have to consider in this case was whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances In the former case they would find for the plaintiff, in the latter for the defendants.

The jury found a verdict for the defendants.

The plaintiff being dissatisfied with the question submitted to the jury by the learned judge, gave notice of appeal.

The question for the consideration of the Court is, was the judge of the County Court right in leaving the question of negligence to the jury in the form hereinbefore stated, without telling them (as the plaintiff contends) that the facts proved did not in law amount to such negligence as would exonerate the defendants from their liability as innkeepers to reimburse the plaintiff for the loss of the £27.

If the opinion of the Court should be in the affirmative, then the appeal to be dismissed with costs; if in the negative, then a verdict to be entered for the plaintiff for £27, with costs of the appeal, it being agreed that in that event each party shall pay his own costs in the court below.

Oppenheim for the appellant. The County Court judge ought not to have left the question of the plaintiff's negligence to the jury, as there was no evidence of negligence on his part. The defendants were bound to satisfy the jury that there was negligence on the part of the plaintiff, but for which the money would not have been stolen. That he failed to do He cited *Ford* v. *London and South Western Railway Company*, 2 F. & F. 730; *Morgan* v. *Rarey*, 2 F. & F. 283; *Cashill* v. *Wright*, 6 E. & B 895; *Burgess* v. *Clements*, 4 M. & S. 306; *Armistead* v. *Wilde*, 17 Q. B. 261; *Cayle's Case*, 1 Sm. L. C. 105.

Charles, for the respondents, was not called upon.

Willes, J.—I am of opinion that this appeal must be dismissed. It appears that the appellant went to an inn of considerable size in Bristol, and went with a sum of money in his pocket, which he did not publicly exhibit, though he took no precaution to prevent its being seen. He engaged a bedroom, to the door of which there was a lock and key; but though he shut the door on going to bed, he neglected to lock it. He left the money in a place where it could be got at by a person who quietly entered the room. The money having been stolen by somebody who entered the bed room at night while the appellant was asleep, this action was brought. As a matter of law, it is insufficient to set up in answer to the action the bare fact that the appellant had a large sum of money and yet left his door unlocked. It is the duty of the innkeeper to take proper care of the property of his guests, and it is possible that he may not have taken proper care to prevent suspicious persons from entering the inn. It might be that, though the jury might think that there was some evidence of negligence on the part of the guest, their judgment on this point might be overborne by evidence of negligence on the part of the landlord, The negligence here imputed to the appellant is that though there was a key in the lock of the door, the appellant did not turn it, and the appellant's counsel has, in answer to that cited the dictum of Lord Coke in *Cayle's case* (1 Sm. L. C 107), that in such a case "it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left the chamber door open." That is referred to by Erle, J., in *Cashill* v. *Wright*, 6 E. & B. 894, who asks, "Can there be such a general rule? Must not the particular circumstances be taken into consideration? Suppose an innkeeper tells his guest: 'Take care of yourself, for some pickpockets have come into the place,' and after that the guest leaves the door open." Lord Coke indeed said that the innkeeper did not get rid of his liability by giving his guest the key; but he never said that such guest, to whom a key has been given, need not, under any circumstances, use it. Supposing that, as was the case in *Burgess* v. *Clements*, 4 M. & S. 306, a stranger had once or twice looked into the room, or other circumstances had happened which ought to have excited the suspicion of the guest, can it be said that under these circumstances he is under no obligation to fasten the door? Lord Coke goes on, after using the expression cited, to give instances in which the innkeeper will be absolved. "If the guest's servant," he says, "or he who lodges with him, steals or carries away his goods, the inkeeper shall not be charged. Moreover, he intimates that a guest may by his own act, take away the responsibility of the innkeeper. "The innkeeper," he says, "requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not; the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest." Therefore, it is quite clear what Lord Coke meant by saying that it is no answer for the innkeeper to say that he gave his guest the key, but that the guest did not use it, was that the innkeeper was not, as matter of law, *ipso facto*, absolved by the mere delivery of the key;

but he then goes on to give instances in which the innkeeper is absolved by reason of the guest having taken the responsibility upon himself. It was urged on the jury by the counsel for the plaintiff that it was not an unreasonable thing for the plaintiff to have left his money in his pocket, and to have left the door unlocked. Some people have an objection to locking their doors. On the other hand, it was urged that if a guest at an inn did not like to lock his door, he ought to put his money away more carefully. All these things are questions of degree and of fact. I think that the County Court judge left the question quite properly to the jury. It seems to me a mistake to say that the innkeeper is responsible unless there has been gross negligence on the part of the guest, as the term "gross negligence," as was pointed out in *Cashill* v. *Wright*, is apt, unless explained, to mislead the jury. It was very clearly laid down by Erle, J., in *Cashill* v. *Wright*, what negligence on the part of the guest absolves the landlord, where he says, that "the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened, if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances." I think in this case it was a question for the jury whether there was not some negligence on the part of the plaintiff, but for which the loss would not have happened. The appeal, therefore, must be dismissed with costs.

Keating, J.—I am of the same opinion Mr. Oppenheim contends that the County Court judge ought to have told the jury that there was no evidence to show want of ordinary care on the part of the plaintiff. If there was no such evidence, then the question whether the plaintiff had taken such care did not arise I think, however, that the judge was bound to leave all the circumstances to the jury. Mr. Oppenheim has contended that, if we say the County Court judge was right, we shall be laying down as matter of law that a guest at an inn is, under all circumstances, bound to lock his door. But all that we do say is, that under the circumstances, the judge was right in leaving the question to the jury. The only question of law that arises is, whether there was any evidence to go to the jury. I think there was, and that the appeal must be dismissed.

M Smith, J.—I am of the same opinion. I think that the direction of the judge was perfectly consistent in point of law. That is not disputed by Mr. Oppenheim, and, indeed, it could not be, for the direction was precisely in accordance with the judgment of the Court in *Cashill* v. *Wright*. But what Mr Oppenheim says is, that there was no evidence of negligence on the part of the plaintiff conducing to the loss, and that, therefore, the judge ought to have directed the jury that they could not find for the defendants on the ground of any negligence on the part of the plaintiff. I am of opinion, however, that there was evidence for the consideration of the jury, and that they were the proper tribunal to decide the question. I quite agree with Mr. Oppenheim that a man is not bound to lock his door; that is a question for himself. At the same time, I should be far from saying, that in the present state of the travelling world, a man had taken proper precautions who left his door unlocked. I do not say that his not locking his door *ipso facto* relieves the innkeeper from his liability, still the fact is a strong one, especially when there are other circumstances of negligence. All these things depend on circumstances. What may be an ordinary act at a small inn may assume a different aspect at a monster hotel. Then, again, the plaintiff had a considerable sum of money with him, and he took out the bag containing it in the commercial room. It was a question for the jury what sort of room this was, and to what kind of people the plaintiff gave an opportunity of seeing his money. The plaintiff then went to bed, leaving the money in his pocket, and though there was a key in the lock, he did not lock his door. I think the judge would have been wrong not to have left these matters to the jury, and that the appeal must be dismissed.

Judgment for the respondent.

NOTES OF RECENT DECISIONS IN THE PROVINCE OF QUEBEC.

Alimony.

A wife has no action against her husband for alimentary allowance on the ground that she cannot be comfortable in the house of her husband. She must reside with him. (Mondelet, Mackay and Beaudry, JJ.)—*Conlan* v. *Clarke*, 1 Rev. Crit. 478.

Banking.

Held, that when a bank discounts for A. a draft by him on B., and accepts a check for the proceeds and delivers it to A., for transmission to B., to enable B. therewith to retire a draft for a similar amount, drawn by A. and accepted by B. for A.'s accommodation, and about to fall due at the branch of the bank where B. resides, on the faith of A.'s representation, assurance and undertaking (without authority, however, from B.) that B. will accept the new draft, and B. receives the check, and before using it has knowledge of the transaction as between A. and the bank, B. cannot legally use the check to retire his own acceptance on the old draft, without accepting the new one.—*Torrance et al.* v. *Bank of B. N. America*, 15 L. C. J. 169.

Bills and Notes—Alteration.

The word "months," which had been omitted in a note after the word "three," had been inserted by the holder without the knowledge of the endorser. *Held*, that this was not alteration, and that the endorser was liable. (Torrance, J.).—*Lainé* v. *Clarke*, 1 Rev. Crit. 475.

Notes of Recent Decisions in the Province of Quebec.

Bills and Notes—Procuration.

Held, that when a promissory note is signed by procuration, proof of the due execution of such procuration must be made to entitle the plaintiff to recover judgment in an *ex parte* suit on the note.—*Ethier* v. *Thomas*, 15 L. C. J. 225.

Corporation—Obstructions.

A corporation is not responsible for the negligence of others in leaving obstructions in the street, when it appears that the driver might have avoided the obstructions. (Mondelet, J.) —*Maguire* v. *The Corporation of Montreal*, 1 Rev. Crit. 475.

Dominion Arbitration.

Held, that the Superior Court of Lower Canada has jurisdiction over an arbitrator appointed by the Government of the Dominion of Canada, under section 142 of the B. N. A. Act, while acting as such within the Province of Quebec, and may enquire whether such arbitrator is in the legal exercise of his office. —*Ouimet, Attorney-General*, v. *Gray*, 15 L. C. Jur. 306.

Election Law — Disqualification of Candidates—Leases by Corporations.

Held—1. That a lease of a stall in the market with the Mayor, Aldermen and Citizens of the City of Montreal, is a contract within the meaning of the 29–30 Vic. chap. 56 sec. 7.

2. That such contract, entered into by a city councillor prior to new election, is not such a continuing contract as will disqualify him, when re-elected, from sitting under the new election, nor thereby deprive him of his seat in the said Council.

3. That, under the Act, 29–30 Vic. chap. 56 sec. 7, the words used being, "Any member of the said council who shall, directly or indirectly, become a party to, or security for any contract or agreement to which the corporation of the said city is a party, or shall derive any interest, profit or advantage from such contract or agreement, *shall thereby become disqualified* and lose his seat in the said Council," the Judge cannot oust from office a member re-elected, who had contracted with the corporation while sitting as councillor under a prior election.

4. The Mayor has not, nor has the City Clerk of Montreal, power or authority to cancel leases made by the corporation, and such deeds of cancellation will be adjudged *ultra vires*.

5. Leases by corporations, and releases, should be under the seal of the corporation.—*Smith* v. *McShane* and the *Mayor et al. of Montreal*, 15 L. C. J. 208.

Election Law—Contract.

Held—1. That the candidate is liable for services of carters engaged at his bidding to convey voters to the polls in a municipal election.

2. That a member of an Election Committee engaging the carters will be held responsible for their wages.

3. That such contracts can be enforced at law by suit.—*Ramage* v. *Lenoir dit Rolland*, 15 L. C. J. 219.

Insolvency—Provincial Legislature.

Held, that by section 91 of the B. N. A. Act of 1867, the Parliament of Canada has exclusive legislative authority in all matters of insolvency, and an Act of the Legislature of the Province of Quebec changing the constitution of an incorporated Benefit Society, so as to force a widow to receive from the Society $200 once for all, instead of a life rent of 7s. 6d. weekly, on the ground that the Society was insolvent, is unconstitutional and null, and may be declared so by the courts having civil jurisdiction within the Province.—*Belisle* v. *L'Union St. Jacques*, 15 L. C. J. 212.

Insolvency—Dower.

The decision of Mr. Justice Torrance, recorded at p. 243 of *La Revue* was reversed in Review, Mackay, J. dissenting. Messrs. Justices Mondelet and Berthelot were of opinion that section 57 of the Insolvent Act of 1869 did not apply to dower and other *gains de survie* dependent upon the contingency or condition of survivorship to the husband, these special rights of our civil laws not being expressly mentioned in the provision of the Act. Mr. Justice Mondelet further remarked, that even if they had been so mentioned, the provision of the Act would be unconstitutional, the Parliament of Canada having no control over the civil laws of the Province. Mr. Justice Mackay was in favour of Mrs. Morrison's claim, because it was founded upon our Insolvent law, interpreted in the way in which the English Courts had interpreted a similar section in the English statute, the way in which the Courts in Ontario or New Brunswick would interpret it.—*In re Morrison and Dame Anne Simpson, claimant*, v. *Henry Thomas*, 1 Rev. Crit. 474.

Insolvency—Execution Creditors.

A guardian under a writ of compulsory liquidation in Insolvency matters has a right to take out a *saisie revendication* against a seizing bailiff and the creditor, who, although well aware of the issuing of the compulsory writ, persist in holding the estate of the insolvent

under an ordinary writ of execution—in this case a writ of *saisie gagerie*. The bailiff, Mercier, was condemned, jointly and severally with the landlord, to deliver the estate to the guardian and to pay the costs. Mercier was further ordered by the court, *suo et proprio motu*, to be struck off the list of bailiffs of the Superior Court. (Mackay, Torrance and Beaudry, JJ.)—*Whyte* v. *Bisson et al*, 1 Rev. Crit. 474.

Insolvency—Book Debts.

The purchaser of the book debts of an insolvent estate cannot complain that some of these debts have been collected by the assignee previously to the auction sale, although the list of debts showed no such collection when the sale was made. (Mondelet, J.)—*Lafond* v. *Rankin*, 1 Rev. Crit. 475.

Insolvency—Guarantee.

Held, that an assignee under the Insolvent Act of 1864 cannot be sued *en garantie* in respect of a matter for which the insolvent was liable to guarantee the plaintiffs *en garantie*.—*Hutchins et al.* v. *Cohen*, 15 L. C. J. 235.

Insolvency—Composition.

Held, that a composition discharge under the Insolvent Act of 1884 affects the insolvent only, and does not relieve outside parties secondarily liable, not parties to the insolvent proceedings.—*Martin* v. *Gault*, 15 L. C J. 237.

Insurance.

Introducing into the insured premises a gasoline machine of a dangerous character without the consent of the insurer, is a violation of the policy. (Mondelet, J.)—*Matthews* v. *The Northern Insurance Co.*, 1 Rev. Crit. 475.

Joint Stock Company.

No stock of an incorporated Company can be called for, unless the conditions antecedent to such call have been complied with. (Monceiet, J.)—*Massawippi Valley R. C. Co.* v. *Walker*, 1 Rev. Crit. 475.

Justice of the Peace—False Arrest.

An information for perjury, contained in three depositions, prepared by counsel, was laid before two justices of the peace before arrest. After the arrest no examinations were made of witnesses, nor did the accused confess; yet he was committed to jail, there to be kept till discharged by course of law. The accused was discharged on *habeas corpus*, and afterwards for want of prosecution. Action in damages against the justices for $5,000. *Held*, reversing the judgment of Superior Court, that the commitment not being based upon information reduced to writing before the magistrates, was null, and that the magistrates were responsible for the false arrest. Judgment for $100 and costs. (Mackay, Berthelot, Beaudry, JJ.)—*Lacombe* v. *Ste. Marie et al*, 1 Rev. Crit. 474.

Libel—Corporations.

Action in damages for libel. The defendants demurred upon the ground that an action for libel did not lie against a corporation. *Held*, that civil corporations are governed by the laws affecting individuals. Demurrer dismissed. (Beaudry, J.)—*Brown* v. *The Corporation of Montreal*, 1 Rev. Crit. 475.

Railway Company—Common Carriers.

Notice of arrival of goods being given by the Company to the owners or consignees that they "remain here entirely at the owner's risk, and that this Company will not hold themselves responsible for damage by fire, the act of God, civil commotion, vermin or deterioration of quantity or quality, by storage or otherwise, but if stored, that a certain rate of storage would be charged for the storage of the goods," and which was paid to the Company by the owners.

Held, that though the liability of the Company as common carriers had ceased, by the arrival of the goods, the Company was still liable for damage as warehousemen and bailees for hire; but that in this cause the evidence did not show any negligence on the part of the railway company. Duval, C. J., Monk and Stuart, JJ. (*ad hoc*). *Contra*, Badgley and Drummond, who held that by law negligence was presumed if damage shown, and the onus of proof of care was on the Company, who had made no proof whatever to rebut the presumption against the Company. — *Grand Trunk Railway* v. *Gutman*, 1 Rev. Crit. 478.

Seduction.

Plaintiff being aware that the defendant was a married mon, sued him in damages for seduction. *Held*, that no action then lies. (Berthelot, J.).—*Lavoie* v. *Lavoie*, 1 Rev. Crit. 474.

Taxes—Lease.

Under a clause in a lease the tenant had promised to pay *all the taxes on the premises, ordinary and extraordinary, foreseen and unforeseen*, during the lease. *Held*, that this clause did not comprise taxes for the widening of streets, for which compensation had been paid to the landlord. Badgley, Monk, Drummond, JJ. (Dissenting, Duval, C. J., and Caron, J.)—*Shaw* v. *Laframboise*, 4 Rev. Crit. 476.

Taxes—Sale for, to Corporation Officer.

This action instituted before the Superior Court for the District of St. Francis, was

brought to annul a sale for municipal taxes and rates, made at the instance of the defendants, the corporation of the Township in North Ham, in February, 1868, and sold to the Secretary-Treasurer of that municipality at an undervalue.

Held, that the provisions of the civil code prohibiting agents and others from becoming buyers of the property, which they are charged with the sale of, apply to subordinates.—*Wicksteed* v. *The Corporation of the Township of North Ham, et al.*, 15 L. C. J. 249.

REVIEWS.

Canadian Illustrated News. George E. Desbarats: Montreal.

There has been for some time a marked improvement in this illustrated weekly paper. It is most creditable to its enterprising publishers, and deserves a generous encouragement from the inhabitants of the Dominion. What we especially admire is the absence of all that nasty, mawkish sensationalism that renders nearly all the American illustrated papers inadmissible to families of refinement and good taste. It is published by George E. Desbarats, 1 Place d'Armes Hill, Montreal, at the low price of $4 per annum.

The American Law Register. D. B. Canfield & Co.: No. 430 Walnut st., Philadelphia. $5 per annum. Nov. and Dec, 1871.

The leading articles are, "The Liability of Life Insurance Companies in case of Suicide," and an interesting sketch of the relative positions of the Legal Profession in England, written by Hon. I. F. Redfield, which we may reprint for our readers. There is also a large selection of cases, some with learned notes appended by the Editors.

APPOINTMENTS TO OFFICE.

GOVERNMENT OF ONTARIO.

THE HON. EDWARD BLAKE to be President of the Executive Council of the Province of Ontario. (Gazetted Dec. 30, 1871.)

THE HON. ADAM CROOKS to be Attorney-General for the Province of Ontario, in the place and stead of the Honorable John Sandfield Macdonald, resigned.

THE HON. ALEXANDER McKENZIE to be Secretary and Registrar of the Province of Ontario, in the place and stead of the Hon. Stephen Richards, resigned.

THE HON. ARCHIBALD McKELLAR, to be Commissioner of Agriculture and Public Works for the Province of Ontario, in the place and stead of the Hon. John Carling, resigned.

THE HON. PETER GOW to be Secretary and Registrar of the Province of Ontario, in the place and stead of the Hon. Alexander McKenzie, resigned.

THE HON. ALEXANDER McKENZIE to be Treasurer of the Province of Ontario, in the place and stead of the Hon. Edmund Burke Wood, resigned.

THE HON. RICHARD WILLIAM SCOTT to be Commissioner of Crown Lands for the Province of Ontario, in the place and stead of the Hon. Matthew Crooks Cameron, resigned.—(Gazetted Dec. 21st, 1871.)

POLICE MAGISTRATES.

JOSEPH DEACON, Esq., Barrister-at-Law, to be Police Magistrate for the Town of Brockville.

DAVID GEORGE HATTON, Esq., Barrister-at-Law, to be Police Magistrate for the Town of Peterborough. (Gazetted Nov. 25th, 1871.)

REGISTRARS.

EDWARD JOHN BARKER, of the City of Kingston, Esq., M. D., to be Registrar of the City of Kingston, in the room and place of George A. Cumming, Esq., deceased. (Gazetted Dec. 23rd, 1871.)

DEPUTY CLERK OF THE CROWN.

PETER O'REILLY, of the City of Kingston, Esq., Barrister-at-Law, to be Deputy Clerk of the Crown and Clerk of the County Court of the County of Frontenac, in the room and stead of Peter O'Reilly, Senr., Esq., deceased. (Gazetted Dec. 16th, 1871.)

NOTARIES PUBLIC FOR ONTARIO.

WALTER MATHESON, of the Town of Simcoe, Esq., Barrister-at-Law; EDWARD OSLER, of the Village of Fergus, Gentleman, Attorney-at-Law; and JOHN REID, of the Village of Edwardsburgh, Gentleman. (Gazetted Nov. 25, 1871.)

CHANCERY SPRING SITTINGS.

WESTERN CIRCUIT.

(Hon. the Chancellor.)

Toronto	Tuesday	March	12
Goderich	Tuesday	April	2
Stratford	Tuesday	"	9
Woodstock	Tuesday	"	16
Chatham	Tuesday	"	23
London	Tuesday	"	30
Sarnia	Tuesday	May	7
Sandwich	Friday	"	10
Walkerton	Tuesday	"	21

EASTERN CIRCUIT.

(Vice-Chancellor Mowat.)

Lindsay	Wednesday	April	17
Peterboro'	Tuesday	"	23
Cobourg	Friday	"	26
Belleville	Thursday	May	2
Kingston	Thursday	"	9
Brockville	Thursday	"	16
Ottawa	Monday	"	20
Cornwall	Thursday	"	23

HOME CIRCUIT.

(Vice-Chancellor Strong.)

St. Catharines	Wednesday	March	20
Hamilton	Wednesday	"	27
Guelph	Wednesday	April	3
Barrie	Wednesday	"	10
Whitby	Wednesday	"	17
Brantford	Wednesday	"	24
Simcoe	Thursday	May	2
Owen Sound	Thursday	"	9

To Correspondents.—"A Student." We cannot publish any anonymous communications. He might read the leading article in our last issue with advantage.

DIARY FOR FEBRUARY.

1. Thur.. Last day for Co. Treas. to furnish to Clerks of Muns. in Co.'s list of lands liable to be sold for taxes. Exam. of Law Students for call to the bar with honors.
2. Fri... Exam. of Law Students for call to the bar.
3. Sat... Exam. of Artic. Cks. for certificates of fitness.
4. SUN.. *Sexagesima Sunday.*
5. Mon.. Hilary Term begins. Last day for Artic. Cks. going up for inter-exam. to file certificates.
7. Wed.. New Trial Day, Q.B. Last day for sett. down and giving notice of re-hearing in Chancery.
8. Thur . New Trial Day, C.P. Inter-examinat'n of Law Students and Articled Clerks.
9. Fri... Paper Day, Q.B. New Trial Day, C.P.
10. Sat... Paper Day, C.P. New Trial Day, Q.B.
11. SUN.. *Quinquagesima Sunday.*
12. Mon.. Paper Day, Q.B. New Trial Day, C.P.
13. Tues.. *Shrove Tuesday.* P. D., C.P. N.T. Day, Q.B.
14. Wed.. *Ash Wednesday.* P. D., Q.B. N.T. Day, C.P.
15. Thur.. Paper Day, C.P. Open Day, Q.B. Re-hearing Term in Chancery commences.
16. Fri... New Trial Day, Q.B. Open Day, C.P.
17. Sat... Hilary Term ends. Open Day.
18. SUN.. *Quadragesima Sunday.*
25. SUN.. *2nd Sunday in Lent.*

THE

Canada Law Journal.

FEBRUARY, 1872.

We devote much space in this number to the judgments delivered by six of the judges of the Court of Error and Appeal in the celebrated Goodhue case. The case will be re-argued before a fuller Bench on the 11th March, and further authorities will probably be cited *pro* and *con*. Our readers having now the judgments already given before them, will be able to form their own opinions as to the merits and law of the case. The result which we should most like to see would be the disallowance of the Act by the Governor-General. This, however, is not thought likely, and if not done, this extraordinary piece of legislation, which has caused so much litigation, will, in all probability (whichever way the Court of Appeal may decide), be ventilated in England, not, we apprehend, to the credit of those who were concerned in passing the Act.

We direct special attention to the judgment of Mr. Justice Gwynne, who has originated a new theory, viz: that the act does not sufficiently show that the Legislature intended to affect the interests of the grandchildren. If he should prove correct in this view, which he supports by a most able and ingenious judgment, it will be a "facer" to the promoters of the bill; and the result would be sufficiently disappointing to those who have in other respects engineered their own interests so successfully. The Chief Justice, who does not agree with Mr. Gwynne, deals with the subject in his own peculiarly incisive manner.

A question of precedence as between Crown Cases and civil suits in the order of their disposal by the Courts came up this term in the Common Pleas, in the case of *Reg.* v. *Gaines*.

It was contended by the counsel for the Crown in that case that Crown suits had precedence over any others on the paper. The Court having made enquiries from the Clerks of the Crown in both Courts, as to what the practice was in this respect, ruled that Crown cases had the precedence over other causes; the learned Chief Justice remarking that the Queen had a right to be heard in her own Courts, in her own suits before all othrs. We trust Her Majesty, being strong, will be merciful, and let her subjects have a fair share of the good things going in the way of justice.

The privileges belonging to the Queen, as representing the public, as distinct from individuals, have been many, and some of them harsh enough to the latter. That some of them are disappearing is not a matter of regret. The one under discussion is of no great moment in itself, though of some practical importance in the disposal of business.

It is well known of Sir John Patteson, that difficulty in hearing occasioned his retirement from the English Court of Queen's Bench. Knowing his own passion for law, and yet feeling that his deafness might impede the administration of justice, he obtained a promise from one of his most intimate friends to suggest to him the fit moment of retirement. The promise was faithfully kept, and when the suggestion was made, this most able judge at once retired from a profession which he had followed with the passion of an enthusiast. It seems to us, judging from the tone of the Quebec legal journals, that there is at least one judge in that province who, though late, might even yet profitably follow the great example of Mr. Justice Patteson.

We are indebted to our enterprising correspondent at Halifax, Mr. Meagher, (Blanchard and Meagher) for an important decision in Insolvency. Mr. Justice Ritchie seems to have followed the current of authority in England,

though agreeing with the view of some of the udges there that the result of those cases is not as satisfactory as might be desired. We are not aware of any decision in our Courts on this point. *McDonald* v. *McCallum*, 11 Grant, 469, came near it, but is not an authority on the question decided in the Nova Scotia case.

While some members of this metropolitan municipality are struggling to have taxes imposed on the judges' salaries, we observe from the *Pittsburgh Legal Journal*, that, by the action of the Treasury Department, the taxes paid by the judges of State Courts in the United States on their respective salaries received from the State Treasuries, are to be refunded.

We view with envy the gold-begetting list of legal notices in "the oldest law journal in the United States," *The Legal Intelligencer*, of Philadelphia. So famous is this paper, that we understand the correct pronunciation of its name is an unfailing test of whether a man is intoxicated or not. In one of the late weekly issues we count some 170 official and semi-official advertisements — the columns of this paper being the authorised medium for publishing such information to the public. Attempts are being made by other journals to have a partition of this privilege, but they are sturdily anathematised in the "leaders" of the official favourite. It has often occurred to us that there would be more sense in official notices, &c., being published in this Journal rather than in an Official Gazette, which is read by none who can avoid it.

Many men, many minds—many judges, many judgments. In Illinois, the judges in one Supreme Court held that the maxim of independence, "all *men* are created equal," does not extend to women, and that by virtue thereof, or of anything else, they have no right of suffrage. In the same State, another Supreme Court decides that this maxim does apply to vagrant children, so that a statute providing for the rescue of such "little wanderers," and the committal of them to a reformatory school is unconstitutional, and a "tyrannical and oppressive" infringement upon the liberties of the citizen. In effect, therefore, juvenile vagrancy receives judicial sanction, and the state is powerless to protect and save destitute minors and orphans! We thought "*Salus populi suprema lex.*"

SECURITY FOR COSTS FROM FOREIGNERS WITHIN THE JURISDICTION.

SECOND PAPER.

In the English Common Law Courts the contest is between the rule laid down in *Oliva* v. *Johnson* and that in *Tambisco* v. *Pacifico*: that is, whether a foreigner must shew that he is permanently resident in the country, or whether his temporary residence is sufficient to exempt him from giving security.

Looking at the course followed in other courts in find that the Equity Exchequer pursued a practice contrary to *Oliva* v. *Johnson*. In *Willis* v. *Garbutt*, 1 Y. & J. 511 (1827), where it was shewn that the plaintiff usually resided in Canada, and that he was *about* to leave the country, yet the court refused to order security. In a case before Leach, V. C., in 1826, the application was made on an affidavit that the plaintiff and his family usually resided in Marseilles, and that he was about to quit the country: this was unanswered, and yet the motion was refused: *Anon*, 5 L. J. Ch. (O. S.) 71. In 1845 the order was granted in the case of a foreigner who was at the time actually out of the jurisdiction: *Perrot* v. *Novelli*, 9 Jur. 770. In 1853 the Courts of Equity were at conflict amongst themselves on this question. In that year the Master of the Rolls decided *Ainslie* v. *Sims*, 17 Beav. 57, where it was shewn that the plaintiff carried on business, and was usually domiciled in Scotland, and that he had taken lodgings in London, and then filed his bill. The court thought the residence within the jurisdiction was merely colourable, and ordered security. In the report in Beaven, Sir John Romilly said, "I by no means say that if a foreigner were to come here and take up his abode and hire a house for a certain period, he would be required to give security." In the report in the *Jurist*, (vol. 17 p. 757), he is reported to have said, "if a person came for a *visit* that would not be enough, but it would be otherwise, if he were to come on permanent business into the country." In the same year, Wood, V. C., refused to follow this case, and held that a foreigner temporarily resident in the country will not be required to give security. *Cambottie* v. *Inngate*, 1 W. R. 533. In the following year, Wood, V. C., again adverted to *Ainslie* v. *Sims*, and said that the Master

of the Rolls expressly guarded himself in that case against being supposed to say that in every case in which a suit is instituted by a foreigner having a temporary residence in this country he may be compelled to give security for costs. See *Swanzy* v. *Swanzy*, 4 K. & J. 237. In 1859 some consideration was given to this point in our own Court of Chancery in *O'Grady* v. *Munro*, 7 Grant 106, and the holding there was in accordance with *Tambisco* v. *Pacifico*.

In the Irish Courts, *Oliva* v. *Johnson* has been considered overruled, and the authority of *Tambisco* v. *Pacifico* has repeatedly been recognized: See *Sisson* v. *Cooper*, 4 Ir. L. R. 40; *Allain* v. *Chambers*, 8 Ir. C. L. R. app. vii. (1858). So in the United States, Greenleaf in his "Overruled Cases" treats the case in the Queen's Bench as over-ruled by the later case in the Exchequer.

The various text books afford curious examples of the uncertainty that has obtained on the points under discussion: Maddock's Practice cites *Willis* v. *Garbutt* as laying down the rule. Morgan & Davey refer to *Cambottie* v. *Iungate* as the governing case. Daniell's Practice lays down the practice as determined by *Oliva* v. *Johnson*, and does not even cite *Tambisco* v. *Pacifico*, while in Chitty's Archbold (12th ed. p. 1415), nearly all the common law cases are cited, but the true practice is left undetermined in the text. It is submitted that the proper rule is between the extremes of the holding in *Oliva* v. *Johnson*, and that in the earlier Common Pleas and Equity cases. It is not necessary on the one hand to shew a permanent residence within the jurisdiction to exempt a foreigner from giving security, nor is it sufficient on the other merely to shew that he is actually within the jurisdiction at the time of the application. This in fact is the view adopted in the latest English case on the subject, where the application was made in 1860 in the Divorce Court before Sir Creswell Creswell. The important cases on both sides of the question were cited, and that very eminent judge laid down the rule thus, "where the party, being a foreigner, is in England, and there is no reason to suppose that he is on the point of going away, no order will be made for security." And he held in opposition to *Oliva* v. *Johnson* that the affidavit in answer to the application need not state an intention of permanent residence, but that it was sufficient to shew an intention to remain till the suit was disposed of: *Crispin* v. *Doglione*, 1 Sw. & Tr. 522.

REPLEVIN—GOODS IN THE CUSTODY OF THE LAW.

An important point has been decided in Chambers by Mr. Justice Gwynne on the law of replevin, which it is desirable should be made public as soon as possible. It came up on an appeal from a decision of the Clerk of the Queen's Bench, who had refused an order for a writ of replevin against a guardian in insolvency on the ground that no such action would lie under the second section of the Replevin Act. It is very seldom that an appeal from Mr. Dalton's ruling is made, and when made more seldom is it successful; this one may, therefore, be noted as the exception which proves the general soundness of his decisions; and as to this point, it has, we believe, hitherto been supposed, amongst the profession, that the law was as laid down by Mr. Dalton.

We do not intend at present to state the facts of the case in full, as it will shortly be reported; but the point decided is simply that goods in the possession of a guardian or official assignee in insolvency are not in "the custody of any sheriff or *other officer*" within the meaning of sec. 2 of Con. Stat. cap. 29. In other words that goods may be replevied from a guardian or assignee in insolvency, notwithstanding the second section of the Replevin Act.

The reasons which the learned Judge gives for his opinion, in a very elaborate judgment, are to our minds conclusive, notwithstanding the apparently comprehensive words of the section; but we cannot at present state them at length. He holds, however, that the term, "sheriff or other officer," means a sheriff, or such an officer as his deputy or bailiff, or a coroner, "to whom the execution of such writ of right belongs;" and that what is declared by the statute not to be authorized is the replevying the goods which *such* sheriff or other officer shall have seized under or by virtue of the process in his hands; and that when the goods are delivered to the guardian or assignee, in discharge of the sheriff, the former holds them, and has only a right to

detain them, on the supposition that they are the property of the insolvent, which supposition, however, their true owner has a right to prove to be false, and take the goods as his own.

There can be no doubt at least of this, that this view is the one most consonant with practical justice; if the law be not as stated, incalculable injury might arise to the true owner, without any possibility of redress, and without doing any good either to the insolvent or his creditors.

LAW SOCIETY, HILARY TERM, 1872.

Owing to the Hon. Adam Crooks being appointed Attorney-General, a vacancy occurred among the Benchers, which was filled by the election of the Hon. E. B. Wood to the vacant seat.

During this Term, John Hutcheson Esten, Esquire, Barrister, the son of the late Vice-Chancellor Esten, was appointed Deputy Secretary and Librarian and Sub-Treasurer. The appointment is an admirable one in itself, and his assistance will at this time be very valuable, owing to the failing health of Mr. Hugh Gwynne, who has for many years occupied the position of Secretary and Librarian.

CALLS TO THE BAR.

During this Term the following gentlemen were called to the Bar:

Hon. J. H. Gray (Nova Scotia bar), Robert Wardrope (English bar) — also Alfred Frost, without oral; Charles Rann Wilkes, Arthur Wellington Francis, Charles C. Backhouse, William A. H. Duff, Wm. McDonald, Davidson Black, W. G. P. Cassells.

ATTORNEYS.

The following gentlemen were admitted as Attorneys:

Messrs. McBride, Roaf, Clute, Reeve, Spragge, Fuller, Vincent, Platt, Ball, Pousette.

INTERMEDIATE EXAMINATIONS.

The following students passed their intermediate examinations during the Term:

Fourth Year.—C. R. W. Biggar, R. M. Fleming, J. Bruce Smith, T. McIntyre, C. E. Barber, G. A. McKenzie, R. E. Kingsford (all without oral); G. H. D. Hall, E. R. O'Donnell, I. B. McQuesten, G. M. Roger, R. McLean, A. B. Kline, H. H. Sadleir.

Third Year.—G. B. Fraser, W. McDonald, (without oral); Thos. McGuire, H. Gale, O. A. Howland, T. B. Moore, C. G. Snider.

Mr. Biggar was highly complimented by the Treasurer upon the excellence of his papers.

PROFESSIONAL JOTTINGS.

One can scarcely read a single number of an English periodical, without being struck with the terribly overcrowded state of the profession there; nor can we doubt a similar result in this country, if young men will still blindly rush into a profession to which many are utterly unsuited, either in education or capacity, but which *seems* to promise not only a respectable position in life, but an easy livelihood. In fact they fondly imagine that when their fathers have provided them with a profession, Providence will kindly provide them with clients. Within a few years after entering an office, this confiding, or, it may be, lazy youth, finds that the pursuit of legal knowledge is under perpetual difficulties, and has no royal road. If he has sufficient energy and diligence (helped on by the admirable system of legal education which we have in Ontario, by means of intermediate examinations, scholarships, &c.) to pass his final examinations, he finds himself afloat on his own resources. He may possibly have a business connection, or form a good partnership, but too often the deep waters go over him. In a young, expansive country like Canada, this is not so marked a feature in professional life; but in England, more seem to sink than to swim. The following is an extract from an article in the *Law Times*, calling attention to the distressing state of things in England:

"A barrister was a debtor, and his lordship made an order for payment by monthly instalments of £2. On the debtor's behalf it was stated that he had on an average one brief in a twelvemonth, and could not pay £2 a month out of so precarious an income. But to what or to whom is to be attributed the melancholy condition of so many barristers?—for the learned judge was undoubtedly right when he said that not one in twenty covers his outlay on entering the profession. In the first place, numbers of needy men go to the bar on the merest speculation, without any particular gift of eloquence or special knowledge of law, and, what is still more fatal, without connection. Not only this, however, but, strange to say, men who, both physically and intellectually, are unfitted for the practice of the law,

crowd the ranks of the bar. The shortest possible stature is considered no disqualification, whilst woolly-headedness, effeminacy of intellect, defective articulation, and the utter absence of the logical faculty, present no difficulties to the mind of the young aspirant or his guardians. A large number of barristers are, beyond doubt, unsuited in every way to the profession; but, again, many, admirably adapted for it, are without private means; too frequently have no idea of earning money outside their vocation; and, worn out by the cares of existence, sink into the condition which revealed itself to Mr. Justice Byles. There are, however, hard cases, which no foresight could provide against. The increase in the number of barristers, many being the near connections of attorneys, scatters the work (already in process of being scattered by legislation) relating to county courts. To such causes is attributable the bare appearance of many a table in the Temple once well covered with profitable business. Sound lawyers, of acknowledged capacity and experience, are unemployed; and this fact it is, to which we would principally call the attention of undergraduates, and men already in professions which they desire to leave. A livelihood is not to be got out of sessions where there are on the average two counsel to one prisoner; nor out of circuits, save to the favoured few, where there are frequently three times as many (on the Home circuit we should say ten times as many) counsel as there are causes. London business is in the hands of a score of prominent men, but the cause lists are slowly dwindling to insignificant proportions."

The picture here presented is wretched in the extreme; and although it would be exaggeration to say that it is fully true in this country, it is only a question of time and of degree even with us. A few men carry off the prizes by dint of force of intellect and persevering industry. A large number, of less capacity, make a decent living by a careful attention to business. But others, again, eke out a miserable existence (and especially miserable in that they have to keep up a respectable appearance) by stray suits and odds and ends of business, until, fortunately for themselves, they are compelled by want to turn to some other more congenial and profitable employment.

After thus taking a warning from the destitute position of some of our brethren in England, we turn from the unpleasant picture we have been contemplating, to another matter of interest to the profession in Ontario, and that is, as to the propriety of a division of labour.

In England, each branch of the profession undertakes a distinct field, and individuals attach themselves to one or other, as inclination or accident may determine. In the United States, things in this respect are much the same as with us; but the following remarks, taken from the *American Law Times*, show that the subject has received some thought there, and the observations of the writer contain some useful hints for us:

"The tendency of the members of the profession towards the specialties, which is, we think, unmistakeable, is a most fortunate condition, and one which we hope may develope into a permanent rule. As law is 'the most learned of all arts'—an art in its grandest, broadest, and the best sense—its practice should be governed, in some degree at least, by the same principles that experience has demonstrated to be almost essential in those arts which are recognised as such. It would seem to be an impropriety in a painter or sculptor to work in two distinct fields, or to attempt to combine two well defined schools in a single creation. The Michael Angelos of the past are few in number; and if their splendid successes afford any ground for regret, it is that their powers were possibly distracted, and not directed toward the accomplishment of one idea.

"The space of a single life is not long enough to enable even the most subtle and active mind to digest the wonderful and complex propositions which meet it at every turn in its wanderings through the labyrinth of learning which make up 'the temple of the law.' The most patient and conscientious labour must fail, unless it be directed toward the exploration of a special part These truths are pregnant with instruction, and are producing their results. Even at this early day in our history, we find that wherever a specialty can be successfully adopted, there are lawyers of ability who seize upon the opportunity, and make it their own.

"In nearly all of our cities we discover that there are certain eminent firms who confine themselves to a single line of practice, or divide their business, each partner having control of a particular subject. We have endeavoured to obtain data which would illustrate how far the above is true, and learn of no less than twelve or more subjects which have been resorted to as specialties; some of them by young lawyers whose career has little more than commenced, and others by those who have grown grey in the courts. We note particularly the following: Admiralty, Patents, Insurance, Testamentary Law, Real-Estate Law, Commercial Law, Bankruptcy, Criminal Law, Corporation Law,

Railroad Law, to which may be added, perhaps, Internal Revenue and Banking.

"We hope the time may come when every applicant for admission to the bar will consider himself called upon to select some special line of practice, and to make its investigation alone the object of his professional life. It may not be practicable to pursue such a course in the rural districts; but in the cities it is not only practicable, but desirable in every respect."

In a new country this division of labour must be of slow growth; but that it will come by degrees, cannot be doubted, and is just as sure in the legal as in any other profession or business: in fact it has already commenced, and with favourable results.

LAW BILLS OF THE SESSION.

The following Bills have been introduced, and will probably be ready for the assent of the Lieutenant-Governor before they meet the eyes of our readers:—

An Act to declare the true construction of the Act passed in the thirteenth year of the reign of Queen Elizabeth, and chaptered five, and intituled "An Act against fraudulent deeds, alienations, &c."

Whereas by the first and second clauses of of the Act passed in the thirteenth year of the reign of Her Majesty Queen Elizabeth, it is enacted as follows:—

"For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions more commonly used and practised in these days than hath been seen or heard of heretofore, which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions have been and are devised or contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder and defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages penalties, forfeitures, heriots, mortuaries, and reliefs not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargain and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued: All and every feoffment, gift grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them by writing or otherwise, and all and every bond, writ, judgment and execution at any time had or made since the beginning of the Queen's Majesty's reign, that now is, or at any time hereafter to be had, or made to or for any intent or purpose before declared or expressed, shall be from thenceforth deemed and taken only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs by such guileful, covinous or fraudulent devices and practices as is aforesaid, are or shall or might be in any ways disturbed, hindered, delayed or defrauded to be clearly and utterly void, frustate and of none effect; any pretence, colour, feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding."

And whereas it is also by the sixth clause of the said Act provided and enacted as follows:

"This Act or any thing herein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is, or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid, anything before mentioned to the contrary thereof notwithstanding."

And whereas there are doubts as to the true construction of the said Act, and it is expedient to declare the true construtions of the same; Therefore Her Majesty, by &c., enacts as follows:

1. The first and second clauses of the said Act apply to all instruments executed to the end, purpose and intent in the said clauses set forth, notwithstanding that the same may be executed upon a valuable consideration and with the intention as between the parties to the same, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless the same be protected under the sixth clause of the said Act by reason of *bona fides* and want of notice or knowledge on the part of the purchaser.

2. This Act shall not apply to any instrument executed before the date of the passing of this Act.

An Act to make Debts and choses in action assignable at Law.

Her Majesty, &c., enacts as follows:—

1. Every debt and chose in action arising out of contract, shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as may be contained in the original

contract; and the assignee thereof shall sue thereon in his own name in such action, and for such relief as the orignal holder or assignor of such chose in action would be entitled to sue for in any court of law in this Province.

2. The bonds or debentures of corporations made payable to bearer, or any person named therein or bearer, may be transferred by delivery, and such transfer shall vest the property of such bonds or debentures in the holder thereof, to enable him to maintain an action thereon in his own name.

3. "Assignee" shall include any person now being or hereafter becoming entitled by any first or subsequeut assignment, or any derivative or other title, to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys, or the charge, lien, incumbrance or other obligation thereby secured.

4. The plaintiff in any action or suit where the assignment is required by this Act to be in writing, may claim as assignee of the original party or first assignor, setting forth briefly the various assignments under which the said chose in action has become vested in him; but in all other respects the pleadings and proceedings in such action shall be as if the action was instituted in the name of the original party or first assignor.

5. In case of any assignment of a debt or chose in action arising out of contract, and not assignable by delivery, such transfer shall be subject to any defence, or set-off in respect of the whole or any part of such claim as existed at the time of, or before notice of the assignment to the debtor or other person sought to be made liable, in the same manner and to the same extent as such defence would be effectual, in case there had been no assignment thereof; and such defence or set off shall apply between the debtor and any assignee of such debt or chose in action.

6. In case of any assignment in writing as aforesaid, and notice thereof given to the debtor or other person liable in respect of a chose in action arising out of contract, the assignee shall have, hold and enjoy the same, free from any claims, defences or equities which might arise after such notice as against his assignor.

7. This Act shall not be constructed to apply to bills of exchange or promissory notes.

8. This Act shall take effect on, from and after the first day of April next, and shall not affect any suits or proceedings heretofore taken or pending.

SELECTIONS.

THE LEGAL PROFESSION IN ENGLAND AND AMERICA.

It is generally known in America, that the profession in England keep up a distinction between attorneys and solicitors on the one hand, and counsellors and barristers on the other, which is not regarded in this country. But we apprehend the extent of this distinction, and how it operates, is not generally appreciated, if indeed it be at all generally understood here. It is not that they do not meet and interchange views, for that they must of necessity constantly do. But they are as entirely distinct as it is possible for any two classes of men to be, who are employed in carrying forward the same enterprises, and are constantly in immediate juxtaposition.

Whether this distinctness and entire separation between these two orders of the same profession is wise or not, or how far it might be modified, with the mutual advantage of both classes, we do not propose now to consider. There has been, and is being now in England, a good deal said, and something done in regard to this question of separation, or consolidation, or modification of this relation. And we may allude to it again in that relation. But for the present we desire to point out how the matter stands there.

In the first place, then, the attorneys and solicitors in England, and equally in Scotland and Ireland, are not members of the bar at all. They are not allowed to sit within the bar, unless it be as matter of indulgence or courtesy, while instructing or consulting one of the barristers; and then they are generally expected to stand, as men stand in the presence of princes, or of marked superiors in age or position. We do not mean that if a solicitor has occasion to hold a very long consultation with the counsel or barrister at the bar, which practically seldom occurs, and out of weariness or forgetfulness he should sink down upon the nearest bench within the bar, or lean against it, he would be admonished by the barrister to stand up, although that may possibly sometimes occur. But generally, we suppose, this or any similar departure from that etiquette would be attributed to some infirmity, either of body or mind, more commonly the latter, perhaps, as where we see one drumming on his hat, or the table, we attribute it to want of culture, or absent-mindedness, or sometimes both. [Rather an extreme way of putting it]

Nothing can be conceived more uncouth or inconvenient than the entire arrangement of an English court-room. In Paris it is entirely different. There the Palace of Justice is one of the most venerable, roomy, comfortable, and at the same time august of all the public buildings of that elegant metropolis. And the court-rooms in the Palace of Justice are broad and high, and roomy, like the Ame-

rican court-rooms, except that there most of the space is appropriated to the convenience of the judges, while in England, as here also, the judges' quarters are very narrow, and those of the bar more ample.

The difference of the social position of the two classes of the profession in England is world-wide apart. That of the barrister is esteemed among the first class of the gentle and well-bred in the kingdom, coming next to the nobility and gentry itself. All the high judicial offices of the realm and its dependencies come exclusively from the higher order of the profession. No judicial appointments, as a rule, are made from the solicitors. Indeed, none can be so made. Many very eminent judicial officers have from time to time begun life as solicitors, but they have become barristers long before they were made judges, and this by keeping their full terms in one of the Inns of Court or Law Colleges, the only avenue to the higher grade in the profession. Lord Hardwicke was originally a solicitor; and the same is true of Chief Justice Wilde, of the Common Pleas, afterwards Lord Chancellor; and Truro, a very eminent Judge, and we believe the present Mr. Justice Hannen, of the Queen's Bench, was at one time a solicitor, and that he was called to the bench before he had taken his silk gown.* And there are many other similar exceptional cases; but the rule is otherwise.

The distinction between senior and junior counsel, not only in position but in work, is maintained with great strictness and, it might almost be said, severity. A barrister "in stuff," who settles the pleading, and does much of the manual labour in preparing a cause for hearing, the moment he "takes silk," as it is called, ceases from all such work, even in the causes in which he is already engaged, and other counsel must be employed and instructed before the case can proceed, if the delay costs the loss of a trial at the time appointed: at least this is the rule. There may be, now and then, an exceptional case, growing out of the exceptional character of the man; for in England, as everywhere, there will be some exceptional characters, who will insist upon doing their own work in their own way, in spite of all the canons of custom, or the horrors of those who will regard them as little less than barbarians, because they presume thus to transgress the rules of etiquette.

But no solicitor is ever, under any pretence whatever, permitted to intrude himself into any office or function of the barrister, either senior or junior. He may know more law, and be better able to present the case understandingly to court or jury than all the barristers in London or Middlesex; and that is sometimes true in a particular case; but he cannot be allowed to say one word to the court or jury, or to ask one question of any witness, under any pretence whatever. One would just as soon expect him to come into court *in puris naturalibus*, or to utter the direst profanity in the presence of the judges. The thing is not even to be dreamed of. If one happens to have a complicated cause, or a stupid barrister to conduct it, which is not an exceptional case anywhere, he must be content to let his solicitor, perhaps a brilliant man and an elegant speaker, distil his, the lieutenant's, ideas through the cranium of his forlorn senior counsel, who is the only man whom etiquette will allow the court and jury to listen to in the first instance, the other barristers following him in the order of seniority; but the solicitors never, under any circumstances.

There is another rule, too, which looks very queer to an American lawyer. The most condescending and courteous barrister will not, on any account, allow himself to communicate with his client, face to face. That must be done, and can only be done, through the solicitor. The client may himself understand the case better than any barrister, both the law and the fact. He may have a cause of great complication and difficulty. He may sometimes feel that his solicitor is not fortunate either in his comprehension or his mode of communicating with counsel, and that he fails to give the fullest force of the cause, or some particular points of it, to the counsel. No matter; his mouth is sealed. He must commit an inexcusable discourtesy, or lose his cause, and lose it any way he will, if he presumes to violate the cast-iron etiquette and consistency of the English bar. His counsel would throw up his brief in the midst of the trial, if his client should presume to speak to him in court, or indeed out of court, in regard to the cause. It is a thing not to be endured, and no man ever thinks of it, any more than the culprit in the dock, under sentence of death, thinks of redeeming his lost position by an assault upon the judge. The thing is simply impossible. It is not only *fiat justitia ruat cœlum*, but let justice come in its own way, or the sky will fall!

Now, all this sounds very ludicrous to an American; more so, if possible, than our practice does to an English barrister. An English barrister in full practice cannot well comprehend how this is endured by American counsellors, for whom he cannot help entertaining a sort of half-and-half respect, after seeing them, day after day, and finding that they sometimes understand the rules of the English law quite as familiarly as himself—whom he cannot help respecting, we say, if he would; but there is certainly no want of courtesy

* Mr. Jeaffreson, in his Book about Lawyers, gives a long list of distinguished members of the bar, who began as solicitors; among whom he enumerates Sir William Grant, Master of the Rolls, and one of the most eminent of all the long line of English equity judges; Lord Mansfield, the most original and self-reliant of all the distinguished common-law judges; Lord Thurlow, for many years Lord High Chancellor, and whose ability and independence gained him respect, in spite of his sometimes coarse wit and constant profanity; and Sir Samuel Romilly, Master of the Rolls, and a law lord for hearing appeals in the House of Lords, although but seldom sitting in that capacity.

among the English bar towards their brethren in America, as many of us have had the very best reason to know and to feel. But still, with every disposition to put himself in our places, he cannot comprehend how such a man, who seems just as courtly and polished and learned as himself, can possibly ever condescend to be dogged by, it may be, a rather rough and disagreeable client for months and years, not only at his office and in office hours, but at his dwelling also; and at all hours and in all places; at home and abroad; in the railway carriage and by the wayside, and by letters innumerable; on all days, *fasti et nefasti;* before church and after church; at baptisms, and fasts, and festivals; not giving him time to eat or sleep in quiet; and ready, as the good patriarch said in his extremity, "to swallow down his spittle" before he dies.

We do not blame our English brethren for escaping, if they can, this awful ordeal. It is too sad a truth to be lightly spoken of; but it is the life of an American lawyer in full practice, and it ought not to surprise any one that the profession in other countries cannot comprehend why we submit to it. But we do, nevertheless.

It is a necessity which grows out of our perfect social equality among all grades and denominations of men. We doubt if the same degree of separation between the solicitor and counsel, or between client and counsel, exists anywhere else, as in England. We are sure this separation is much less rigidly enforced in Scotland than in England. In Edinburgh the members of the bar commonly have their offices at their dwellings, and there meet the solicitors and their clients; and in France there seems to be no reluctance among the most eminent avocats to meet both clients and the subordinate members of the profession, whether avocats or avoués, as the solicitors are there called.

We are not surprised at the recent movement in England to provide a more liberal basis for the intercourse of the different grades of the profession. We have watched the movement with sincere interest; not because we have any hope that it could teach any lesson which it would be possible for us to profit by. This is one of the subjects to which the maxim *nulla vestigia retrorsum* applies with invincible force. It would no more be possible for the American bar to adopt and enforce any rules of etiquette among themselves except those of the most general and unmeaning character, than it would to restore the wig and gown, which are certainly not without their significance and value in the English bar.

There is something about this matter of ceremonial, in America, which seems puzzling, when attempted to be viewed upon any basis of reason or consistency; or, to speak more artistically, in the affected terminology of the schools, when psychologically considered. There is no country in the world, probably, so fond of all manner of ceremonial, pertaining to dining-room and drawing-room manners. And the same is true of all social fêtes, weddings included. The Americans seem willingly to make themselves a world-wide laughing stock, in all these matters, by their very excesses. But the moment you touch any such matter, or official dress or ceremony, unless it be in the army or navy, there seems to spring up a kind of competitive rage, to absolutely run the thing into the ground; as if they could never rest satisfied with the work of demolition. The movement in Congress to dispense with all diplomatic costume, by our representatives abroad, was a striking instance of infatuation in this way, which no foreigner ever will or can comprehend, except as an appeal to the popular prejudice, in our own country, against official ceremonial. That our ministers should be in advance of all others in dress and ceremonial everywhere else but at court, and positively barbarous there, is not easy of explanation, except upon the basis of an appeal to popular prejudice; and in that view it is scarcely respectful to the courts where we claim recognition, since commonly we expect the head of a household to set the pattern of ceremonial in his own house, and others to follow; and this furore in regard to diplomatic costume seems to be nothing less than an attempt to control such matters, both at home and abroad.

We have read Mr. Jevons' letter, upon which the movement in England, just referred to, rests, or to which it is primarily referable, mainly, if not exclusively; and we must confess that it strikes us as eminently reasonable, just and moderate. We cannot comprehend why it may not be adopted. But we know that such changes come about very slowly among long-established institutions in an old and stable order of things. We believe the order of solicitors dates no further back than the days of the Star Chamber; and that at first they had no very well defined office more than some members of the profession have among us, who assume to undertake what others will not or cannot accomplish. We hope we may be pardoned for an allusion to Mr. Jevons', which is mainly of a personal character. He is one of the leading solicitors in Liverpool; a gentleman of high culture and learning, both in his profession and elsewhere. We met no member of the profession in England, either within or without the bar, who seemed to us more calculated to do honor to himself and valuable service to his clients, in any department of practice, than Mr. Jevons. He seemed to us a gentleman whom no terrors could deter from doing his duty, and whom no influence could swerve one hair's breadth from the strict line of duty. There are many other honorable names of a similar character among the solicitors of England; among whom Mr. Edwin Field, so often mentioned by Crabbe Robinson in his Diary and Correspondance, is worthy of honorable remembrance, with whom as well as Mr. Jevons we formed a most delightful ac-

quaintance; all of whom the barristers would gladly welcome to their ranks. But the mass of the solicitors of England must be regarded as a somewhat lower grade of men, both in culture and character. By being restricted to a lower grade in the profession, they seem, while losing caste, to have lost something of that nice and critical self-respect, which proves so indispensable in maintaining a high degree of honor and decorum in any profession or pursuit. And we greatly fear that in combining both orders of the profession in this country, we shall be more in danger of pulling them all down to the lower level, than likely to bring them all up to the higher plane of professional honor and purity. There are, no doubt, in the English bar a very large proportion of members who have almost no occupation, but who live in chambers at the different inns of court, and subsist in a very small way, upon a narrow income, inherited perhaps;—whom you will never see in court or in society; but who are nevertheless pure-minded, clean-handed men; not a whit inferior in point of character to the ablest men in Westminster Hall or Lincoln's Inn. We have no such men, and never can have, whose very presence is a rebuke to vice, and a defence from crime. Many of our hangers-on, upon the contrary, are a dead weight to drag us downwards. And by hangers-on we mean to embrace many who are nominally in the bar, but have gone into other and more hopeful pursuits on the score of emolument or promotion, and among the number, many who have gone into political life and who subsist upon robbery of one kind or another. From none of our number do we receive more fatal wounds.—*American Law Register.*

CANADA REPORTS.

ONTARIO.

COURT OF ERROR AND APPEAL.

In re Goodhue.
Tovey v. Goodhue.
Goodhue et al. v. Tovey et al.

Right of Provincial Legislature to pass an Act interfering with private rights—Disallowance of Act—Interpretation of Statutes—Rights of parties, infants, not named in Act—Property out of Province not affected.

[Error and Appeal, January 16, 1872.]

This was an appeal from the Court of Chancery.

The Hon. G. J. Goodhue, on 11th January, 1870, died, seized and possessed of large real and personal estate, partly in this Province, part in England, and part in the United States. He left surviving him, his wife, one son and five daughters, all married, also the wife of a deceased son, a sister-in-law, as well as several infant grand-children. By his will, dated 8th December, 1869, he devised and bequeathed to H. C. R. Becher and Verschoyle Cronyn, their heirs, executors, administrators and assigns, all his estate and property (subject to some specific devises of real estate for the life of the respective devisees, and to certain annuities to his daughter-in-law and sister-in-law), in trust for conversion and collection, and for the investment of the proceeds thereof. He directed the trustees to pay his funeral and testamentary expenses, his debts, certain legacies, the said annuities, and the taxes and insurance premiums on a house and premises devised to his wife. He directed the surplus of the annual income and proceeds of his estate to be accumulated during the life of his widow, and that upon her death the trustees should hold all the trust premises then undisposed of and not otherwise disposed of by his will, in trust to make good any loss that might have arisen and been ascertained in the investment and control of certain moneys which he had paid over to the said Becher and Cronyn in trust for his (the testator's) children respectively, and which sums and the trusts thereof were more particularly described in six certain indentures of settlement dated the 8th December, 1869, and respectively executed by the Testator and the said Becher and Cronyn, and thereafter in trust for all the testator's children who should be living at the decease of his wife, in equal shares, and for the child and children of such of them as might then be dead, in equal shares, such grandchild or grand-children to be entitled to the share which his, her, or their father or mother would have been entitled to if living.

By indenture made after the testator's death, and dated 26th September, 1870, his widow, his surviving son, and his five daughters and their respective husbands, after reciting the will, and after other recitals as to the annuities and legacies, and that the residuary estate amounted to more than $300,000, and that it was desirable that the children should respectively enter into possession and enjoyment without waiting for the death of the testator's widow, and that the several parties had agreed to execute the said indenture, in order to secure to each of the children of the testator the immediate possession of their respective shares in the residuary estate, exclusive of their reversionary interest under the will, they mutually covenanted and agreed that sufficient sums to pay the annuities and other charges created by the will should be set apart and held by the trustees to pay and satisfy the annuities and other charges mentioned in the will, after which they provide for the division of the residue of the trust estate into six parts, and for the allotment of one part to each of the children absolutely in severalty, the share allotted to each daughter being free from the control of her present or any future husband. Similar provision was made for the division of the reserved sums as they severally fall in, and they also agreed to apply to the Legislature of Ontario to confirm the arrangement, and for all necessary and incidental powers.

By the Statute of Ontario, 34 Vict. c. 99, passed 15th February, 1871, it was, after reciting the will at length, and referring to the deed of 26th September, 1870, enacted that the said deed should be confirmed and made valid, and the trustees were authorized and required to carry into effect the provisions thereof; and were, in so doing, saved harmless and indemnified.

Mr. Becher, one of the trustees named in the will, refused to carry out the arrangements contemplated by this deed, and confirmed by the statute. The other trustee expressed his readiness.

Thereupon a petition was presented to the Court of Chancery, by the testator's six children, praying that the trustees might submit their accounts, that a referee might be appointed for making the allotment and distribution provided for by the indenture, that the trustees might be ordered to carry into effect such allotment and distribution, when made, and that all proper directions might be given, enquiries had, and accounts taken.

The Court made an order, granting the prayer of the petition, against which Mr. Becher appealed.

1. Because it was beyond the power of the Legislature to pass this Statute, and it ought not to have been acted upon by the Court.

2. Because it appeared that some of the parties, prejudicially affected by the Statute, were domiciled in Great Britain, and others in the United States of America, and never had their domicile in this Province.

3. Because a considerable portion of the testator's estate was not in this Province at the time of his death.

4. Because the order directs the appellent to commit a breach of trust, without affording him any protection.

A suit was also instituted in the Court of Chancery in the names of three infant grand-children of the testator, not living in the Province, and by Mr. Becher, against all the children of the testator, and against the several husbands of his daughters, and some of the testator's grand-children. The bill, among other things, set forth, that by the Royal Instructions, the Governor-General was directed to reserve for the Royal Assent, or to disallow, any bill of an extraordinary nature and importance, whereby the rights and property of Her Majesty's subjects, not residing in the Dominion of Canada, might be prejudiced: that the petition above stated had not been served on the infant plaintiffs, or infant defendants in this suit, nor was any notice given them. And it prayed for an injunction against any act or thing, by virtue of the order of this Court, on the aforesaid petition, or the statute, or the indenture or deed of distribution, and that the indenture of distribution, statute and order might be declared void, and that the trusts of the will might be carried into effect.

The testator's son, Charles F. Goodhue, demurred to so much of this bill as sought relief in respect of the orders of the Court, as no case is made for relief by the bill, and as the matters thereinbefore specified were adjudicated on the hearing of the petition.

Some of the other defendants also demurred to the amended bill, on the ground that it made no case for relief.

The Court allowed the first demurrer, giving leave to amend, and disallowed the second.

The plaintiffs appealed against the order allowing the demurrer, and the other demurring defendants appealed against the disallowance of their demurrer.

C. S. Patterson and *Barker* for the appellant.

Crooks, Q. C., and *S. H. Blake* for the respondent.

Chief Justice of Appeal (Draper). — The principal question arises on the first reason of appeal against the order made upon the petition, viz., that it was beyond the power of the Legislature to pass this statute. If the Act can be shown to be a dead letter, the order founded upon its validity falls lifeless and inoperative. It required an Act of the Legislature to alter a will after the death of a testator, which will was at the time of its execution made in strict accordance with the law of the land, and in exercise of his rights and power; for it is not questioned that he had sufficient discretion to make a will, and that he exercised his own free will. He was under no legal incapacity, and it stands admitted that before this Act was passed the will was operative, the estates and interests created and given, vested in the trustees and in the beneficiaries named; and the very deed by which the children of the testator agree to defeat, as far as in them lies, the accumulation directed by the testator, as well as certain contingent interests given by him to his grand-children, provides that it, the deed, shall be of none effect unless the Act desired is obtained from the Legislature.

The life estate of the widow in the mansion and premises in which the testator resided rests on the will alone; for though the Act confirms the indenture of 26th September, 1870, it confirms nothing else, and the indenture does not profess to deal with the devise to her. And further, I cannot refrain from remarking that to every owner of lands or goods in the Province of Quebec, who has a right to alienate the same in his lifetime—is given, by the Statute of 14 Geo. III., chapter 83, s. 10, the right to devise or bequeath the same at his or her death; and that such right was virtually, though not in words, re-enacted and confirmed by the first statute of Upper Canada, which made the law of England the rule for the decision of all matters of controversy relative to property and civil rights. This right the testator had, and he exercised it in a legal manner.

The conduct of the children, beneficiaries under this will, is not marked with that deference and respect for the wishes and intentions of their deceased father which he most probably anticipated and relied upon, and but for which reliance he might have made the disposition of his property in such form as to ensure effect being given to what he might express.

He was absolute owner of a large amount of property. By law he and he only could transfer it, either by his acts while he lived or by his will to take effect after his death, by which latter means he might either fulfil, or disappoint, or qualify the *spem successionis* which blood relationship or kindred might create.

Now, whether by his will or by intestacy (leaving the disposition, regulated by law, to take effect), on his death the rights which up to his death the owner of private property had, are transferred, and any one who prejudices such rights or interferes with their enjoyment is a

wrong-doer to the transferee, as by similar acts he would have been to the prior owner in his lifetime.

These are mere truisms, but they have their application to the present case.

The testator intended that his residuary estate should accumulate during the life of his widow. He intended, also, that the children of any of his children who died in the lifetime of his widow should take their parents' share, and he provided for both these matters in language as clear as that used by him in making gifts to his children. But his intention evidently has met neither their wishes nor their expectations, and, therefore, by the deed of 26th September, in which there are no other considerations suggested than these—because the residuary estate exceeds $800,000: because "it is desirable" that the children should get their shares immediately, rather than that they should wait for the period fixed by the testator, and because they executed that deed to secure to each child such immediate possession by an immediate division of this large residue, they mutually agree on a mode of division which shall bind them; and because it was "doubtful" whether their arrangements could be legally assented to and carried out by the trustees by reason of the coverture of several of the parties, and also from the insufficiency of the powers of the trustees under the will, they agree to apply to the Legislature to confirm *their* arrangements, and to compel the trustees to carry them out in place of those stated in the will; in other words, to abrogate the disposing power of the testator after he had unequivocally exercised it, and to take away the possibility which the will had created in favour of grandchildren—in short, to deprive him of powers which the law had given him.

The concurrence of the widow is really of no importance; for, in fact, the deed does not prejudice any of her interests arising under the will; on the contrary, it seems designed to secure them to the fullest extent.

I think that, on the death of the testator, the rights of his children under his will became vested in interest, though not in possession; but that they were liable to be defeated as to each child if he or she should die in the lifetime of the testator's widow, in which case the interest of such child vested in his or her children, but was still postponed as to possession till the death of the widow. The promoters of the Act sought to have their interest given to them in possession.

The Legislature have passed such an Act as the parties applying desired. They have, in effect, altered the testator's will—not to supply a defect, which rendered it difficult or impossible for his trustees to carry his intentions into effect—but to substitute an intention contrary to what he has expressed, by rendering the accumulation impossible, and making the division immediate which he directed should await the death of his widow.

It would be indecorous to express what it would be fitting for a Court to express if such changes had been procured in the testator's lifetime, by or through any fraud, or imposition upon him. It is now, if a valid Act, the Act of the highest authority—an Act of our Legislature, which has received the assent of the head of the Local Executive on behalf of the Governor-General. It cannot, however, be disrespectful to quote the language of Lord Tenterden. "It is said the last will of a party is to be favorably construed, because the testator is *inops consilii*. That we cannot say of the Legislature; but we may say that it is '*magnas inter opes inops*:'" *Surtees* v. *Ellison*, 9 B. & C., 752.

No English authority has been cited, nor do I think there is any, which would warrant our denying the power to pass such an Act. There may be cases in which the decisions look in the direction of neutralizing the enactment by construction, or in which a long series of decisions have, as it were, fined away the force of the language used, so as apparently to disappoint the intention of its framers; but they do not apply here.

Among the classes of subjects with regard to which exclusive power is given to the Provincial Legislatures to make laws, we find "property and civil rights in the Province," and "generally all matters of a merely local or private nature in the Provinces" I cannot say that the present is not a matter belonging to one or other of these classes.

Nor do I think that we can derive any help from American authorities, though there is much to be found full of valuable suggestion to those who wield the Legislative power. For, as in England, it is a settled principle that the Legislature is the supreme power, so in this Province, I apprehend that within the limits marked out by the authority which gave us our present Constitution, the Legislature is the supreme power. It is on this principle that private Acts of Parliament are upheld as common modes of assurance, being founded upon the actual or implied assent of those whose interests are affected.

But this power of binding private rights by Acts of Parliament is, as Sir W. Blackstone suggests, to be used with due caution, and upon special necessity; as to cure defects arising from the ingenuity or the blindness of conveyancers, or from the strictness of family settlements, or in settling an estate, as where the tenant of the estate is abridged of some reasonable power; or to secure the estate against the claims of infants, or other persons under legal disabilities. In these or the like cases "the transcendent power of Parliament is called in to cut the Gordian knot." (Parl. His., Vol. IV., p. 247.) The restoration of Charles II. gave rise to a good deal of this private legislation, and at the close of the Session (13 Ch. II., 1661) His Majesty observed on the unusual number of Private Bills, "But I pray you let this be done very rarely hereafter. The good old rules of the law are the best security. And let not men have too much cause to fear that the settlements that they make of their estates shall be too easily unsettled *when they are dead*, by the power of Parliaments."

It may not be too much to suggest that, in the absence of a second Chamber, and to secure the interposition of full discussion and patient consideration between the introduction of private

bills and the final act of legislation, there should be some stringent rules as to full particulars of notice, and providing for a long interval between the first reading and the third; and again for ample time for a report by the Law Officers of the Crown, as to the protection of any private interest involved. These, however, are not questions for our consideration.

"As to what has been said as to a Law not binding if it be contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable, and all, therefore, that we can do, is to try to find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice or absurdity, another construction possibly might be put on them, but still it is a question of construction, and there is no power of dispensation from the words used."—(*Per* Lord Campbell in *Logan* v. *Burslem*, 4 Moo. P.C. C., p. 296.]

Mr. Sedgwick, in his learned and admirable treatise upon Statutory and Constitutional Law, argues, and I think unanswerably, that the Judiciary have no right whatever to set aside, to arrest or nullify a law passed in relation to a subject within the scope of Legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice, or sound morality."—(P. 187.)

Again, Chancellor Kent (1 Com. 408) writes, "Where it is said that a Statute is contrary to natural Equity or reason, or repugnant, or impossible to be performed, the cases are understood to mean that the Court is to give them a reasonable construction. They will not, out of respect and duty to the lawgiver, presume that every unjust or absurd consequence was within the contemplation of the law; but if it should happen to be too palpable to meet with but one construction, there is no doubt in the English Law of the binding efficacy of the Statute."

A late British writer has remarked, it may be argued, that a second Chamber is considered a valuable element in the Constitution, (in the mother country,) and that as to its importance he makes no dispute. "On the principle of a division of labour it is wanted for the despatch of business, and it is also required for the interposition of discussion and delay between the hasty introduction of bills and the final act of legislation."

In regard to the absence of a second chamber, it may be further observed, so far at least as estate or private bills are concerned, that as such bills involve ordinarily no mere party political considerations, all those whose interests are or may be touched have a right, in the first place, to expect a careful examination of their contents, on the part of the Provincial Executive —and a withholding of the Royal assent if it is found that the promoters of the bill are seeking advantages at the expense of others whose interests are as well grounded as their own. And further, if from oversight, or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are still subject to the consideration of the Governor-General, who, as the representative of the Sovereign, is entrusted with authority,—to which a corresponding duty attaches, to disallow any law contrary to reason, or to natural justice and equity. So that while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there, cannot be revised or amended by any other authority, it does not become law until the Lieut.-Governor announces his assent, after which it is subject to disallowance by the Governor-General.

I can find neither principle nor authority upon which to hold that the Courts of this Province have jurisdiction to override or pronounce nugatory Acts passed by the Legislature in relation to matters coming within the classes of subjects enumerated in the 92nd section of the British North America Act. We have not failed to consider the exception in the 129th section in connection with 14 Geo. III., c. 83, s. 10; but we think that we could not hold that these provisions place beyond the power of the Provincial Legislature an Act like that in question.

I have not omitted to consider the difference of the language used in, as well as the substance of the clauses of the British North America Act, 1867—on erecting the Parliament of the Dominion, and the Legislatures of the respective Provinces.

In and for the Dominion, there is one Parliament, consisting of the Queen, the Senate, and the House of Commons, and the Sovereign being one branch of this Parliament, provision is made for the Royal assent being given by the Governor-General in the name of the Sovereign, whose commission, under the Great Seal of the United Kingdom, he holds, to such Bills as the two Houses pass, or for the reservation of any such Bills for the signification of Her Majesty's pleasure. An Act assented to by the Governor-General may, however, be disallowed by the Queen in Council, within two years after it has been received by one of the principal Secretaries of State, to whom it is the duty of the Governor-General to transmit it.

But, in the Province of Ontario, there is constituted a *Legislature*, not as in the Dominion, a Parliament, which, Legislature consists of the Lieut.-Governor—and of one House, styled the Legislative Assembly of Ontario.

As to assenting to Bills passed by the Legislative Assembly, it is provided for only under sec. 90 of the British North America Act, 1867, which extends the provisions of that Act, regulating (among other things) the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, to the Provincial Legislatures with some alterations and substitutions. The assent to bills is regulated by sec. 55 of that Act, thus: "where a bill passed by the House of Parliament is presented to the Governor-General for the Queen's assent, he shall declare according to his discretion," &c., &c. Reading this, together with sec. 90, a doubt may possibly be suggested, whether in relation to the Provincial Legislatures, it should be read—"where a Bill passed by any of the Provincial Legislatures is presented to the Lieut.-Governor for the Governor-General's assent—he

shall," &c. This would apparently be the literal substitution provided for by sec. 90, and if correct, this consequence would follow: the "Governor-General" being substituted for "the Queen," the Lieutenant-Governor would declare "that he assents to the Bill in the Governor-General's name, or that he withholds the Governor-General's assent, or that he reserves the Bill for the signification of the Governor-General's pleasure." I am not called upon to put a construction on these two clauses, nor shall I offer any opinion with regard to the proper construction as to the assent to Bills.

As to disallowance, the clauses as to the Lieutenant-Governor's duty seem clear, that he is required by the first convenient opportunity to transmit an authentic copy of each Act assented to by him to the Governor-General, and if the Governor-General in Council within one year after the receipt thereof by him thinks fit to disallow the Act—such disallowance (with a certificate of the Governor-General of the day on which the Act was received by him) being signified by the Lieutenant-Governor by speech or message to the House of Assembly or by proclamation, shall annul the Act from and after the day of such signification.

But whether the power of assent or disallowance be, under the British North America Act, as regards Acts of the Legislature of Ontario, absolutely vested in the Governor-General so that he exercises such authority as given to him by that Act—and as in regard to the Parliament of Canada acting in the name and behalf of the Queen herself as the Lords Commissioners do in the mother country when Her Majesty cannot attend in person—makes, as far as I can see, no difference in the authority of the statutes when finally assented to. The statutes of the Legislature of Ontario are binding on all the residents of that Province, if made in relation to the subjects enumerated in the 92nd section of the British North America Act, 1867.

Assuming this Act to be in force, there is a difference of opinion between us as to its effect. As I understand, some of my brothers place a much more limited construction upon it than I can agree in.

Their view is, as I understand, chiefly founded upon the eighth clause of the deed of 26th September, 1870, as set out in the schedule to the statute in question, which recites doubts whether the intended arrangement for the settlement and distribution of the estate could be carried into effect by the trustees *by reason of the coverture of several of the parties thereto* and from the insufficiency of the powers of the trustees under the will, and it is contended that the first section of the statute, by which that deed "is confirmed and declared to be valid," and the trustees authorized to carry into effect the several provisions thereof, has no greater effect than to remove the objection as to coverture, and to enlarge the powers of the trustees so as to carry into effect such matters as were doubtful for the cause suggested.

It will not be disputed, that this being a private Act, ought to receive a strict construction so far as the interests of all parties affected by it are concerned. The intention of the Legislature, to be collected from the general object and from the language of the first section, which alone is in question, must decide our judgment; and the recitals of the Act may, and I think must be taken into consideration to aid in arriving at that intention.

Now the first thing recited in the statute is the petition praying for relief, which sets forth the testator's will containing the provision already set out, by which he provided for the conversion and collection of his estate, and after other provisions, devised and gave the same in trust for all his children who should be living at the decease of his wife, in equal shares, and the child or children of such as might then be dead, in equal shares, such grandchild or grandchildren to be entitled to the share his or her or their father or mother would have been entitled to if living. The petition further sets forth that the shares of the said children are considerable, and that it is desirable they should enter into possession and enjoyment of the same, and that this should not be postponed until the decease of the widow; that to secure to the children such immediate possession and enjoyment of their respective shares, the petitioners respectively executed a certain instrument dated 26th September, 1870—a copy of which is set forth in a schedule annexed to the Act—and they prayed that an Act might be passed *to confirm the indenture and the several provisions thereof, and to effectuate the same.*

The next recital is in these words, "*And whereas it is expedient to grant the prayer of the petitioners,*" and immediately following, the first clause, confirming "the said indenture," declaring it valid, and authorizing and requiring the trustees to carry into effect the several provisions thereof.

Now what was the prayer of the petitioners? The will, in very clear language, postpones the possession and enjoyment by the petitioners of this residuary estate until the death of the testator's widow. The petition states that it is desirable that the petitioners should enter into possession and enjoyment, and that this should not be postponed, and prays the confirmation of the deed of the 26th September, and the provisions thereof, and to effectuate it.

The deed, so far as the petitioners are seeking the aid of the Legislature for their individual benefit, provides for the division of the above-mentioned residue of the trust estate (exceeding, as is stated, $300,000), by allotting the same into six separate shares, and as soon as these allotments are made, for their distribution in a mode provided for, and for the conveyance of a share to each party according to the distribution and allotments, and this deed the Act confirms and declares to be valid.

According to my view of the intention of the Legislature, derived from the recitals to the Act, and this short but comprehensive clause, they intended, and I have enacted that the division among the testator's children should not be postponed as the will directs, but should be immediate, although on the face of the will a contingency is foreseen and provided for, which the Act, as I understand, advisedly defeats.

I have already stated the opinion, as I understand, held adverse to the construction I place on the Act.

I must observe that the recital relied upon for this opinion is not a recital in the Statute, but in a deed of the petitioners, that the language of it is not the language of the Legislature, nor is it incorporated by the Legislature into their Act; it is set out in a schedule as the thing confirmed and made valid by the Act, but not as a part of it. I have looked with some care into authorities without meeting one which would lead me to treat the recital in this deed as a part of the Act. I do not know whether it is contended that this deed is to be construed, owing to the recital, as only meant to do away with the disability of coverture, and to enable the trustees to act as if such disability did not exist, but I have not so understood the opinions, hereafter to be given, of those from whom I have the misfortune to differ.

I must further add, that no such point, either as to the deed or the Act, is raised by the reasons of appeal, nor was it, to my recollection (though I would not rely on that after the lapse of six or seven months), alluded to during the argument.

It has been suggested that the order on the petition was *ex parte;* but that is not so, as the trustees were respondents, and Mr. Becher appeared by his counsel, and opposed the petition in the interest of the grandchildren. The point, that all the grandchildren, though minors, should have been served with the petition and made parties to it, is not taken in the reasons of appeal, nor was it urged before us in argument. All who might be interested could not have been served; as future born grandchildren would take equally with those *in esse* now; and to serve the infants now living with their parents, in order to give them an opportunity of opposing the petition of their parents, would obviously have been useless for any practical purpose. By the practice of the Court of Chancery, as regulated by the 61st Consolidated Order, and as decided in *King* v. *Keating*, 12 Grant 29, and other cases, trustees sufficiently represent their *cestuis que trust*, though the Court of Chancery, if it thinks fit, may order any of the *cestuis que trust* to be made parties also; and it is plain, in the present case, that the Legislature did not mean that all should be served, for the Act, in express terms, left it to the Court to direct to whom notice of the petition should be given.

We are, however, of opinion that the Act does not affect real or personal property not being within this Province. A majority of the Court are of opinion that this order is appealable. This being so, I am of opinion that it should be varied—by striking out the fifth section and inserting in lieu thereof, "that after such allotment and distribution, the said Master do convey and transfer the respective shares of each of the said petitioners, according to the respective natures of the several parts of such share, unto and to the use of each of the said petitioners, their respective heirs, executors, administrators and assigns, absolutely in severally, the shares of each of the said petitioners, being daughters of the said testator, being so conveyed and transferred for their respective separate use, free from the control of any present or future husband.

I am further of opinion that Mr. Becher was doing no more than his strict duty in opposing this petition, and also in bringing before the Court by means of both appeals the very important question involved in this case and the suits of *Tovey et al.* v. *Goodhue* and others, and that he should have all his costs, charges and expenses in relation to the proceedings in both cases and the two appeals, to be deducted from that portion of the residuary estate which is to be distributed under the said order.

Morrison, J.—I entirely agree with so much of the full and able judgment of the learned Chief Justice of this Court as applies to the power of the Legislature to pass the statute in question, and I concur in the remarks of the Chief Justice made in reference thereto; but, with the greatest respect, I cannot acquiesce in the conclusion that the learned Chief Justice has arrived at. I am of opinion after much consideration of the case; that the order of the Court below should be reserved, for the reasons about to be stated in the able judgment of my brother Gwynne, whose judgment I had an opportunity of reading and considering. I have only, in addition, to observe that, although we had much argument at the hearing upon the constitutional right of the Legislature to pass the statute under consideration, little or no notice was taken of what I think is the real matter in question—the rights of the infant appellants under the will of the testator, and the effect of the Statute upon those rights. It seems to me that to hold that the infant appellants are barred and deprived of their rights by virtue of the Statute—which in effect is the result of the order of the Court below—would be saying that which the Legislature has not said, and that which, in my opinion, the Legislature did not intend, and has not enacted or declared. In order to bar these infant appellants of their rights, and defeat the intention and object of the testator, the statute, in my opinion, should contain an express and explicit enactment to that effect, specifically referring to the appellants. I find no such provision or declaration in the Act; and I will further add that I think it is highly improbable that the Legislature had in their minds an intention to defeat the object and effect of the testator's will; and it is only reasonable to assume that if the Legislature proposed violently to interfere and deprive the grand children of their rights, it would have expressly declared such to be one of the objects and purposes of the Statute. Our Legislature in order to prevent any such injustice, by 31 Vic. cap. 1, sec 31, declared that no parties should be affected by the provisions of a private act such as this, unless therein mentioned or referred to; and if that section had been inserted in this act, it could not be argued that the rights of these infants were affected.

Galt, J. — I concur in the judgment of the Chief Justice, as well as in the remarks made and reasons given for his conclusion. I think the completion of the matter, after allotment, &c., should be made by the Referee, in order fully to relieve the trustees from all further trouble and responsibility.

Gwynne, J.—What has been contended on the part of the defendants in the above suit is, that the Legislature, in the exercise of what is

termed its paramount authority, has arbitrarily, by the Act alluded to (34 Vic. chap. 99), transferred to the testator's children the whole of the testator's residuary estate, although he had not by his will devised it to them, and has deprived the testator's grandchildren of their hopes of partaking in the testator's bounty, by stripping them of all possibility of enjoying estates which, in a given event which may yet happen, the testator had devised to them.

Conceding that the Legislature has the power to commit such a palpable injustice, I cannot be persuaded that the Act in question has done so, unless I find such an intent plainly and unequivocally stated, in language so express as to admit of no possible misconception, and no shadow of a doubt.

It is always to be presumed that the Legislature, when it entertains an intention, will express it in clear and explicit terms: *Gas Co.* v. *Clarke*, 11 C.B., N.S. 827. When an Act of Parliament interferes with, or when the contention is that it interferes with, private rights and private interests, it ought to receive a most strict construction in so far as those rights and interests are concerned; and so clearly is this the established doctrine of the Court, that Lord Justice Sir G. Turner, in *Hughes* v. *Chester* and *Holyhead Railway Company*, 8 Jur. N.S. 221, said that it was unnecessary to refer to any cases upon the point, and that they might be cited almost without end.

In *Eton College* v. *Bishop of Winchester*, Loft., 401, it is said, that the construction of a Private Act is to be governed by the principles of common law, and applied to the subject in a manner analogously to the rules of interpretation of a private deed or conveyance. The Court knows nothing of the intention of an Act, except from the words in which it is expressed.

In *Edinburgh and Glasgow Railway Company* v. *the Magistrates of Linlithgow*, 3 Macqueen, H. of L. 704, Lord Truro C.J., says, that a recital, even in an Act of Parliament, will not bind those who are not within its enacting part. And our own interpretation Act, Ontario Statute, 31 Vict., ch. 1, sec. 31, enacts that if an Act of the Legislature of Ontario be of the nature of a private Act, *it shall not affect the rights of any persons, such only excepted as are therein mentioned and referred to.*

The whole frame of the deed which the Act confirms is based upon the assumption that the estate of the testator's children, living at *his* death, in the testator's residuary real and personal estate, is a vested estate, and that the period of distribution only is postponed until the decease of testator's widow.

The deed recites, among other things, as the occasion of the provisions of the deed, as follows:—"And whereas all the said testator's children have attained the full age of 21 years; and whereas (after paying and providing for all out-goings) the residuary estate is of large value, amounting to more than $300 000, *and the respective shares of the testator's said children therein are* considerable, and it is desirable that they should respectively enter into the possession and enjoyment *of the same, and that this should not be postponed until the decease of the said widow of the deceased;* and whereas the several parties hereto have respectively assented and agreed to enter into and execute these presents, *in order to secure* to each of the children of the testator *the immediate possession* and enjoyment *of their respective shares in the said residuary estate.*" The deed, for the reasons here recited, then proceeds to declare, among other things as follows:

"Now these presents *therefore* witness, and it is hereby respectively covenanted and agreed upon, by and between the said respective parties and their respective heirs, executors and administrators, as follows:"—Fifth—"That the residue of the said trust estate, other than is hereinbefore excepted, shall be divided into six separate shares or allotments of equal value, or as nearly so as circumstances will permit, and such division into the said allotments shall be made as soon as conveniently may be by the said trustees; and in making such allotments, the trustees shall distribute the said trust estate *in specie, as the same may then happen to be*, and without converting or collecting, or assuming to convert or collect *the same or any part of the said trust premises, and without making any equal partition of the said trust estate* which consists of realty, but treating and considering the whole of the said residuary estate to be allotted as converted into personalty, and of the money value ascribed by the said trustees to each part and parcel thereof; and that in case the said trustees shall neglect or refuse to make such allotment or distribution, or in case they should differ about the same, or in case of the death or removal from this Province, or the resignation of either of them the said trustees, in any of such cases any of the parties to these presents, other than the party of the first part, (that is the widow), may apply to the Court of Chancery or a Judge thereof, in a summary manner, *to appoint one or more referee or referees, by whom such allotment* may be *validly* made; and that in case of any difference as to which of the said several allotments *shall be taken by any of the said children, for his or her shares* respectively, the same shall be determined by lot or drawings by the said trustees, or referee or referees, in the presence of at least three of the said children.

6th. "When the said several allotments shall have been determined, and the respective shares distributed or assigned to each of the said children *then* the said respective shares to which the children are before said to be beneficially entitled in common, shall be duly conveyed and transferred according to the several natures of the respective parts of such shares, unto and to the use of each of the said children, their respective heirs, executors, administrators and assigns absolutely *in severalty.*"

Now, throughout the whole of this deed there is not a word to indicate that there was any doubt entertained as *to the vested* estate of the testator's children, living at his death, in the residuary trust estate; true, the will is recited, whereby it appears that the trusts of the will are "for all the testator's children who should be living at the decease of the testator's wife, in equal shares, and the children of such of them as might then be dead, such grandchild or grandchildren to be entitled to the share his, her or their father or mother would have been entitled to if living;" but the deed treats this

as an estate vested in interest in the testator's children living at his death, with the period of possession only postponed until the widow's death, and regards the interest of the grandchildren as being no other than by way of transmission through their parents, the testator's children. The object of the deed, treating the estate of the testator's children to be vested under the will, *is simply to expedite the period of possession, and to obtain a transfer to each of his or her share* in specie; that is whether real or personal estate, to be so conveyed as to pass according to the nature of the estate—if real, to each child's heirs—if personal, to his or her executors and administrators. These are the only deviations from the trust purposes declared by the testator as to his residuary real and personal estate by his will, which are professed and declared to be within the contemplation of the deed, and that this was the whole scope and contemplation of the deed appears clearly, as I think, from the eighth paragraph, viz: "Inasmuch as it is doubtful whether the hereinbefore ageed upon arrangements for the settlement and distribution by the said widow and children of the said estate of the said testator can be legally assented to or carried into effect by the trustees, BY REASON OF THE COVERTURE of several of the said parties hereto, and also *from the insufficiency of the powers of the said trustees under the said will*, it is hereby agreed that an application shall be made to the Legislature of the Province of Ontario *for an Act to confirm* these presents, and for such power as may be incidental thereto, *or necessary in the premises.*"

The object of the deed, then, was to expedite the period of possession of estates claimed to be and treated as vested in interest in the testator's children, and to obtain an *immediate* transfer of such vested estates in both the real and personal estates as existing, instead of in personalty only, after conversion of the realty into personalty; and the declared object of the Act, which was to be applied for, was to *confirm that deed*, and effect those purposes, notwithstanding the doubts as to its validity by reason of some of the parties being *femmes covertes*, and by reason of the insufficiency of the powers given to the trustees to enable them to transfer the estate to the parties to the deed (although entitled to such vested interests) sooner than was directed by the will.

The petition to the Legislature, as set forth in the Act as the reason for the passing of the Act, stated, among other things, the execution of above deed, which was set out in full, and that the object of the deed *was to secure* to each of the children of the testator *the immediate* possession and *enjoyment of their respective shares* in the said residuary estate, without being postponed until the death of testator's widow, and it *therefore* prayed that an Act might be passed in order to confirm the said indenture and the several provisions thereof, and to effectuate the same. It was thereupon enacted—"That the said indenture of the 26th Sept. 1870, in the schedule of the Act set forth, is hereby confirmed and declared to be valid, *and the said trustees* of the estate of the said Honourable George Jervis Goodhue, deceased, *are hereby authorised and required to carry into effect the several provisions thereof*, and in so doing are hereby saved harmless and indemnified in the premises."

Now, in so far as the question of the deed is concerned, all that the Act of the Legislature professes to do is, as it appears to me, to confirm it and make it valid, notwithstanding the doubts therein recited as to its being valid for the reasons therein stated without an Act,—to remove, in effect, simply the suggested doubts.

The Act then proposes to do no more than the deed itself purports to do, and as the deed itself suggests, it could have effectually done but for the doubts suggested. The removal of the doubts was all that was suggested to be necessary to give it complete validity. Now, under these circumstances, what is the effect of the enactment which declares the deed to be valid? A deed is said to be valid, I take it, when it it is effectual to bind the parties thereto and their privies to the extent of the purposes, scope and intent of the deed as declared therein. A deed *inter partes* has no validity or binding force upon any persons not parties thereto. To be bound thereby, a person must be a party thereto or in privity with a party. Infants and married women, although parties to and executing a deed, may not be bound by the deed by reason of their legal infirmity as infants or married women; but no one, whether infant or married woman, can be in any manner affected by a deed touching and concerning matters in which they have an interest, unless they are parties thereto, or unless in virtue of some *express provision* of an Act of Parliament, as for instance, the Act enabling tenants in tail to bar the estate tail and all remainders. The effect of the declaration in the Act is, as it appears to me, at most to declare and enact that the deed shall be valid and binding according to its tenor and effect, true intent and meaning, *upon the several parties* thereto, notwithstanding the doubts expressed as to married women who had signed it not being bound, and upon the trustees of the testator's estate, notwithstanding that they were not, in their character of trustees, parties assenting thereto, in so far as to authorize them to transfer to the parties to the deed in severalty such shares as were vested in them in interest by the will, without waiting for the decease of testator's widow; but the Act does not profess to deprive, and therefore cannot be construed to have an effect so contrary to all our ideas of legislation and of natural justice as to deprive any persons, least of all infants, who are contingently made objects of the testator's bounty, of the prospective benefit of such bounty, nor does it profess to vest, and therefore we cannot construe it to have an effect so contrary to all our ideas of legislation and of natural justice as to vest in any persons an estate and interest in the testator's estate, which the testator has not himself vested in such persons, but has made contingent upon an event yet in the future.

In the absence of an *express* legislative enactment, we cannot, I think, having regard to the recognized rules of construction of all instruments, hold that persons who, depending upon a contingency which has not yet happened, may be entitled to share in the testator's residuary

estate, are deprived of such interest by a simple declaration that a deed, to which such persons are not parties, or in privity with any of the parties, and which treats the estate as one in which they never could have any interest, and as if all persons interested therein were parties executing the deed, *should be valid*. Then the Act authorizes and requires the trustees of the testator's estate to carry into effect the several provisions of the deed. Now, what are these provisions? This question involves the consideration of the construction of the deed, an enquiry as to what is its true intent and purpose, nature and effect. To ascertain this purpose we must look at all the recitals, and at the whole scope and object of the deed as expressed therein, and doing so, we find it to be declared to be to expedite the personal possession and enjoyment of estates *which the deed treats as already vested in interest*, and to obtain a transfer of *such vested estates to each* of the parties entitled to the testator's residuary real and personal estate, in realty and personalty as it exists, and not wholly in personalty after conversion of realty into personalty. The express object of the deed is declared to be "*to secure to each of the children* of the testator the immediate possession and enjoyment of *their respective shares* in the said residuary estate, instead of having the period of such possession and enjoyment postponed until the decease of the testator's widow." Such being the declared object, scope, and intent of the deed, the trustees are authorized and required to carry such object into effect, and the Act is declared to be their warrant for *so* doing. Such, then, being the provisions of the deed, according to the proper construction to be put upon it, it cannot be held that a clause in the Act authorizing and requiring the trustees to carry such provisions into effect, notwithstanding that the testator's will had, as was suggested, directed them to defer the period of possession, should have the effect of requiring them to transfer the testator's estate to persons to whom he had not devised it, and of saving them harmless as against the claims of the parties to whom he had devised it, if they should make such a disposition of the estate of which they were made trustees.

Reading the Act by the light of the recitals contained therein, as to the scope, object and purpose of the deed, and as to the *necessity therein stated* for applying to the Legislature to confirm it, by reason of some of the parties being under coverture, and of doubts existing whether under those circumstances they were bound by the deed, we must, I think, hold that what the Act professes to authorize the trustees to do is not to deprive the infant plaintiffs of the bounty which, in a given event, the testator devised to them, but to divide the residuary estate into six equal shares, and to transfer to the several parties to the deed the several shares *which were vested in them in interest*, if they were vested in them in interest, as the deed treated them to be, thus expediting only the period of enjoyment. Without the most unequivocal and express language, I cannot venture to assume that the Legislature contemplated such an injustice and such a departure from all the rules and principles governing courts of justice, as to deprive the testator's infant grandchildren of the estates devised to them by the testator's will, in the event of their parent, the testator's child, not surviving his widow. The intention of the Act, to be collected from its recitals and enacting clauses, is, as it appears to me, to authorize such shares in the testator's estate, *as the parties to the deed had become entitled to in interest by the will, as the deed treated them to have become*, to be transferred to them in possession, in anticipation of the time specified in the will, and in specie as now existing.

It is, as it appears to me, an unwarrantable interpretation of the intent of the Legislature, and a strained construction of the language used, to hold that they contemplated by force of a Legislative Act to transfer to B. an estate, which in a given event, which may yet happen, the testator had devised to others, and which he had not at all devised to B., otherwise than contingently upon the happening of an event which has not yet happened, and by possibility may never happen; nor does the Act authorize the Court, contrary to its ordinary course and practice, to administer the testator's estate upon a summary application, and in the course of such administration to transfer to B. the immediate possession and absolute enjoyment of an estate which, under the terms of the testator's will, was not vested, and by possibility may never become vested, in interest in him, but which may become vested in others. The Act, in my judgment, gives no jurisdiction to the Court of Chancery to administer and distribute the testator's estate to the prejudice of parties who may become the sole parties under the will, or to deal with such interests in the absence of such persons, and without hearing them or notice given to them; nor do I find anything in the Act which can with propriety be said to divest the Court of Chancery of its high privilege of being the guardian of the rights of infants, or *to compel it* to dispose of those rights to others without suit and a deliberate judgment recorded, and in the absence of the infants. The third section of the Act authorizes any of the parties to the indenture, or their respective representatives, or the said trustees, or either of them, or their successors *under the trusts of the said will* of the said G. J. Goodhue, from time to time to apply in a summary manner to the Court of Chancery or to a judge thereof in chambers, upon notice to such other of the said parties as the said court or judge may direct—but for what purpose? The section in question says this summary application may be made only "in respect of any matter or thing for carrying into effect the provisions of the said indenture *connected* with the management of the trusts of the said will, *or* in the disposition of the proceeds of the said trust estate, or of any part thereof, or in respect of any matter or thing connected therewith, or in respect of which the said *court or judge would have jurisdiction, in case a bill or other proceeding was instituted in the said court*, and obtain the order and direction of the said court or judge thereupon; and such *order may*, amongst other things, require the said trustees to submit statements and accounts of the said trust estate and

the management thereof, and may generally be to the purport and effect *which, in the discretion of the said court or judge*, shall seem meet.

Now, it is an undoubted principle of natural justice, that the rights of parties interested in property, or claiming so to be, shall not be adjudicated upon or disposed of by any court of justice in the absence of such parties, or without their being given an opportunity, to assert their rights. To attribute to the Legislature an intent of subverting this universally recognized principle is what I cannot permit myself to do, unless I shall find that intent expressed in such language as is incapable of being mistaken; if the language be doubtful, I must construe the doubtful language so as to maintain and support inviolate a principle so universally recognized, instead of to subvert it. Bearing in view this sacred principle, and seeing no intention expressed in the Act upon the part of the Legislature to subvert it, this third section presents to my mind the clearest evidence that the Legislature was proceeding upon the basis adopted as the frame of the deed, and the assumption therein apparent, that all parties really interested were parties to the deed, when it provided that the notice of the proceedings in the court was to be given only to the parties to the deed and the trustees. I cannot interpret the language of this third section as providing that the interests, if any there be, of persons strangers to the deed shall be adjudicated upon or disposed of by the court in their absence, or that any such adjudication shall, contrary to the principles of natural justice, be binding upon such strangers so kept in ignorance of all such proceedings. The language of the section seems to me to expressly confine and limit the jurisdiction of the court and judge to the jurisdiction which, according to the established and well-known principles of equity, the court would have, in case a bill were filed for the like purpose, and if a bill were filed, all parties having any interest in the subject-matter in respect of which the jurisdiction of the court was invoked, should have to be brought before the court; moreover, it is apparent from the words "and may generally be to the purport or effect which *in the discretion* of the court or judge shall seem meet," that everything which the court or judge shall do in the premises is left open to the inquiry and the adjudication of a superior tribunal, as to the manner in which, in the given case, such discretion has been exercised; and I must say, that an order made in the absence of infants claiming to be interested in a testator's estate, to which order, when made, is attributed, rightly or wrongly, the effect of depriving the infants of the right to have the question of their asserted claims inquired into and adjudicated upon by the court, upon a bill filed for that purpose, according to the ordinary practice of the court, can in no sense, in my judgment, be said to be an order made in the exercise of a sound discretion, and can have no effect whatever so as to bind or bar the right of the infant claimants to have their claims entertained and adjudicated upon in a suit instituted on their behalf.

But this third section presents further evidence to my mind that it was not the intention of the Legislature to subvert the testator's will by transferring to his children estates not vested in them in interest by the will, and which, by possibility, might become the property of his grandchildren, and not of his children, but simply to expedite the enjoyment of estates assumed to be vested in interest; for the trusts of the will are, by the third section, regarded as still continuing in existence, and, as I read the Act, in all other respects than in so far as the authorizing the transfer of the immediate possession of estates, vested in interest, is an interference with these trusts. It is in respect of the management of the trusts of the will, or the disposition of the proceeds of the trust estate, or in respect of any matter connected therewith, or in regard to which the court would have jurisdiction in case a bill were instituted in the court, that the summary proceeding is authorized. Now, if the court would not have, and it cannot be contended that *it would have*, irrespective of the Act, jurisdiction on a bill filed by the children against the trustees, to compel them to convey to the testator's children estates not devised to them, then the statute gives no jurisdiction to do so by the summary proceeding authorized, and an order directing such a transfer to be made is, in my opinion, an order beyond the jurisdiction of the court to make.

But whatever may be the decision of the court upon the hearing of the cause instituted by the infants, and the trustee, Mr. Becher, who in the discharge of the trust reposed in him by the testator appears to have been in duty bound to invoke by bill the interference of the court—whatever may be the proper construction to put upon the statute, whether or not it shall be found that its operation is absolutely to deprive the testator's grandchildren of the benefit of the testator's bounty, although they, and they only, by reason of all their parents, the testator's children, dying in the life-time of his widow, should prove to be the persons entitled as devisees of the whole of the testator's residuary estate, the infant plaintiffs and their trustee have, in my judgment, an undoubted right to have the adjudication of the court by a decree upon that subject, before the infants, who are no parties to the deed to which the statute relates, and who are not mentioned or referred to in the statute, can be said to be barred of rights which, if any they have, exist wholly independently of the deed, and not by privity with any of the parties thereto.

In so far as the bill and the demurrers thereto are concerned, the case, as it seems to me, may be thus stated. That certain of testator's grandchildren, who may become entitled under the trusts of the will to certain estates thereby devised, and one of the trustees of the will, who is not acting in concert with testator's children file their bill, in effect alleging that the testator's children, claiming to be, and alleging that they are, beneficially seized of estates vested in interest (with period of enjoyment postponed) in the testator's residuary estate, have caused to be prepared a deed which they have executed, whereby, reciting that *they are* entitled to estates vested in interest in the testator's residuary estate, with the period of entering into posses-

sion and enjoyment only postponed, it is agreed among themselves that they shall enter into immediate possession of such estates vested in interest in them, without waiting for the arrival of the period named in testator's will for that purpose, and that they should apply to the Legislature to confirm the deed, upon the representation that the confirmation of the deed by the Legislature would be necessary for the reason only of some of the parties to the deed being *femmes covertes*, and of the *insufficiency* of the powers conferred by the will upon the trustees, and upon the further representation that all that was desired to be done was to secure the immediate possession of estates already vested in interest in testator's children, that by such representations they had applied to the Legislature for, and upon the faith of the representations procured an Act of the Legislature, which, after reciting the scope, object and purpose of the deed to be as above, and the alleged infirmity in the deed, which occasioned the sole necessity for applying to the Legislature, enacts and declares that the said deed, which is set out in the Act, with all its recitals therein contained, shall be valid; that testator's children thereupon, (still representing their estates under the will to be vested in interest,) by summary application upon petition, without notice to the infant plaintiffs, and without making them parties to the proceeding, applied for and obtained from the court what the infant plaintiffs allege and insist was an *ex parte* order, whereby it is ordered that the testator's residuary estate shall be divided into six parts, that is, as many parts as there are children of the testator, and that the trustees of the will shall immediately transfer and convey one of such parts to each of testator's children absolutely in severalty; that the infant plaintiffs and the trustee, Becher, contend that the testator's children have not, under the testator's will, an estate vested in interest in his residuary estate or in any part thereof, and that they may never have any such or any estate therein; and that such residuary estate may, under the will, devolve wholly upon the infant plaintiffs and others, testator's grandchildren; that if the trustees should obey the order of the court they would be guilty of a breach of the trust reposed in them by the will, and would wholly subvert the testator's will; that the defendants, while admitting that the testator's children have in reality no estate vested in interest in testator's residuary estate, insist that the operation and effect of the Act of the Legislature so obtained is to give them such an estate, although before they had none, and to deprive the infant plaintiffs of all prospect of enjoying any benefit from testator's bounty, and they insist that the order of the Court of Chancery is authorized and required by the Act, whereas the infant plaintiffs and the trustee, Becher, insist the contrary, and contend that the Legislature had no power to pass an Act having such effect as is contended for by the defendants; and (although they do not in express terms contend, yet they allege sufficient to raise the point) that the proper construction to put upon the deed and the Act is, that the Legislature has only authorized to be conveyed to the testator's six children the estates, if any, which, as they alleged, were vested in interest in them, and that testator's grandchildren, not being named in the Act, are not affected thereby; and that the order of the Court of Chancery, being made in their absence, and without their being made parties to the proceeding, and without any notice to them, and contrary to the course and practice of the court, without suit, is wholly inoperative to bar their rights. They pray, therefore, that the order of the Court of Chancery so obtained may be reversed; that a proper construction may be put upon the deed executed under such circumstances, and the Act of the Legislature so obtained; and that it may be declared that the infant plaintiffs are not thereby deprived of the benefit of the testator's will; that the trusts of his will in their favor shall be adhered to, their rights and interests protected, and the defendants restrained from proceeding upon the *ex parte* order so obtained, so as to affect or prejudice any rights, estates and interests devised by the will to the infants.

To drive these plaintiffs from the threshold of the Court by allowing a demurrer for want of equity, upon the ground that they have no *locus standi* in equity, because their own bill shows that the operation of the deed, Act of the Legislature, and order of the court, although they were never named in or made parties to, or had an opportunity of contesting any of such proceedings, and upon which deed, Act of Legislature and order they ask the court by bill to put a construction, has been to deprive them of all interest in the testator's will, seems to me, I must confess, to be a mockery of justice. I am of opinion, therefore, that the demurrers should be wholly disallowed, that the order made by the Court of Chancery is inoperative as affects any of the rights and interests of the infants, and that what these rights and interests are must be declared in a decree to be made in the suit, and that in the meantime all proceedings upon the order in Chancery should be stayed.

As to the appeal of the trustee, Becher, against the order itself. His is certainly a very critical position. If the testator's grandchildren, or any of them, should become entitled, as they may, to demand and receive from him the estate devised to them by their grandfather's will, he would, according to the ordinary recognized doctrine of the court, be liable as for a breach of trust if he should not have the estate forthcoming. Now the statute does not in terms direct him to transfer to testator's children any estate in which testator's grandchildren are, or may become, interested; it is only by a strained inference, if at all, that the Act can have that effect. Whether it has or not that effect can only be determined in a suit whereto all parties claiming under the testator's will are made parties, and by a *decree* in such suit. Now the statute does not profess to fetter the court in the exercise of its discretion; it does not *direct* the court *peremptorily* to proceed according to a course which would be subversive of the ordinary established doctrine of the court, that is to say, in the absence of parties interested or claiming to be interested, or to convey or cause to be conveyed to one set of persons estates not

devised to them, and which may in terms of the will devolve upon and become the property of others, some of whom may not yet be in being. The court is left in the unfettered exercise of its sound discretion as to what, according to the particular circumstances arising, it shall order, and as to how it shall proceed.

It is worthy of notice that the petition which invokes the interference of the court proceeds upon the same assertion that the Act of the Legislature proceeded, namely, that the estates devised to testator's children by the will are vested in interest, with the period of enjoyment only postponed. If that be clearly so, then no evil could ensue from the court proceeding upon a summary petition, on notice to the other parties to the deed; but if strangers to that deed contend that no estate, vested in interest, is at all devised to testator's children, and that to deal with the estate upon the basis claimed by the children may work a manifest fraud to the testator's infant grandchildren, then, as it seems to me, the proper course for the court to adopt is to decline to lend its aid to anything prejudicial to such infants in their absence, or otherwise than upon a bill and by a decree of the court, finally determining and adjudicating, according to its ordinary course and proceeding, upon the rights of all parties interested under the will, and by putting a decretal construction upon the deed and the act of the Legislature, which are claimed to have an effect so subversive of all the most acknowledged principles of justice.

It was argued upon the authority of *In re Freeman*, 2 Er. & Ap., 109, that no appeal lies from an order made upon a petition, as the order appealed from here was; but that decision does not, in my judgment, govern this case. There the proper proceeding to lead to the order was a petition, and the subject-matter of the petition was not appealable matter. Here what is complained of is, that the taking any proceeding upon the petition without notice to all parties interested, and affecting to bind the interests of absent parties, and to deprive them of their estates, was, as far as these parties are concerned, contrary to natural justice, and that an order made upon such a petition, which is prejudicial to the testator's grandchildren, was an improper proceeding, and under the circumstances not warranted. *In re Freeman* is, in my judgment, no authority for contending that an appeal does not lie in such a case. I entertain no doubt that it does, and think it was the duty of the trustee to appeal, and that his appeal should be allowed.

Wilson, J.—at present concurred in the judgment of Mr. Justice Gwynne.

Mowat, V. C.—I have read the judgment which the Chief Justice had prepared, and, as I concur in it in the main, I have not thought it necessary to write a separate judgment. I may observe, however, that we all agree that, so far as affects property, real and personal, which was actually in the Province at the time of passing the Act, the Legislature had power to pass the Act, even assuming the construction heretofore put upon the Act to be the correct one; and that in holding that the Act was inoperative, so far as relates to property which was out of the Province at that time, I acted on a correct view as to the limits of the power of the Legislature. That restriction receives further support from the late case of *Lynch* v. *the Provisional Government of Paraguay*, L. R. 2 Prob. and Div., 268, to which we are referred this morning As to the direction in the order that the trustees should convey, I do not agree with my learned brother Galt, that the Court had no power so to order. I think that the Court had that power. I think, however, that conveyances by the referee would have been effectual, and that it was matter for the discretion of the Court, whether to order the conveyances to be executed by the one or by the other; and I do not dissent from the suggestion that that part of the order should be varied. As to the point raised by my brother Gwynne, that the Act does not sufficiently show that the Legislature intended to affect the interests of the grand-children, I have read his judgment very carefully, but I am unable to say that it has created in my mind any doubt as to the intention of the Act. The object of the Act was plainly to give at once to each of the testator's six children one-sixth of the testator's residuary estate; and that is what my order on the petition provided that they should have. That may not have been a right thing to do; it may have been a thing entirely unprecedented in British legislation; but the Legislature, as we all think, had power to do it; and I cannot say that, in view of the whole Act, its enactments, its preamble, and the schedule to it, I have the shadow of a doubt but that the Legislature had the intention to do what the orders *In re Goodhue* assumed as their intention.

Barker, for the plaintiff, asked the Court if the proceeds of some £10,000, Consols brought to this country after Mr. Goodhue's death, were to be included in the division.

Draper, C. J., and Mowat, V. C.—Yes, if the money was in Ontario at the time of the passing the Act.

Becher, Q. C., prayed, that as there was in effect no judgment of the Court of Appeal, the Court being equally divided, and as it was most desirable that a judgment should be obtained, which either party could appeal from to the Privy Council, the case might be re-argued at an early day. There might be then a fuller Bench.

The Court granted the application; and intimated that it would sit for the purpose of hearing the cases re-argued, on Monday, the 11th March, at 10 a.m.

COMMON LAW CHAMBERS.

Gardiner v. Graham.

Security for costs—Next friend.

Where a plaintiff sues by her brother-in-law, as next friend, with whom she lives, he will not be ordered to give security for costs, even though there is a doubt as to his solvency.

[Chambers, Oct. 4, 1871.—*Mr. Dalton.*]

Rachel Gardiner, the plaintiff, an infant, by Alonzo Richardson, her next friend, who was

her brother-in-law, sued the defendant for breach of promise of marriage.

The defendant obtained a summons calling on the plaintiff, by her next friend, her attorney or agent, to shew cause why the rule of court admitting Alonzo Richardson to prosecute this action as the next friend of the plaintiff should not be set aside with costs, and another next friend appointed, on the ground that he was an irresponsible person; or why all proceedings should not be stayed until the said Alonzo Richardson should give sufficient security for the costs.

Contradictory affidavits were filed as to the solvency of the next friend.

J. K. Kerr shewed cause:

This next friend is not only the brother-in-law of the plaintiff, but she is living with him as one of his family, and he is, at present at least, her natural guardian. *Morris* v. *Leslie*, 5 C. L. J. N. S. 318 is an authority in my favor, and *German* v. *Elliott*, 2 C. L. J. N. S. 267 is distinguishable. There is no evidence of insolvency, even if that would be sufficient to uphold this summons: *Yarworth* v. *Mitchell*, 2 D. & R. 423.

W. S. Smith contra.

The case of *German* v. *Elliott* governs here. The next friend not being, as the defendant contends, a responsible person, should give security for costs.

Mr Dalton.—I quite agree that this man is a proper person to represent the plaintiff as her next friend, without giving the security asked for, and I should think this, even if the application were not answered on the merits, which I think it is. *German* v. *Elliott*, so far as it applies, is against the contention of the defendant.

The summons must be discharged—costs to be costs in the cause to the plaintiff.

Summons discharged.

CHANCERY.

(Reported for the Canada Law Journal *by* T. Langton, M.A., *Student-at-Law.)*

Re Caverhill.*

Quieting Titles Act.—Title by prescription—Evidence of length of possession—Notice to person holding paper title—Deeds.

A petitioner claiming title by length of possession must prove possession for the requisite length of time by clear and positive evidence, which should be of more than one independent witness.

In such a case, a notice prepared and signed by the Referee should be served upon the person having the paper title, if he can be found; but if not, evidence should be put in, both of search for him and his representative; and if such search prove fruitless, possession should be shewn to have been long enough against him, even though he had no notice of such possession.

A mortgage more than twenty years old appeared upon the Registrar's abstract. A discharge of this did not appear to have been registered, none was produced nor was any proof given of the mortgage ever having been discharged. It was stated on affidavit that nothing was known of the mortgagees, and that no demand had ever been made for the mortgage debt, though nothing had been paid, and that no acknowledgment had been given within twenty years or more.

Held, that evidence should be adduced of search for the mortgagees or their representatives. That a single *ex parte* affidavit that no payment or demand has taken place, would not bar claims of mortgagees who could be served with notice. But if they could not be found, notice might be dispensed with after a great length of time, and satisfaction presumed.

[November 20, 1868.—*Mowat*, V. C.]

This was a petition by Thos Caverhill, under the Act for Quieting Titles. The chain of title put in as a schedule to the affidavit of the petitioner, shewed the paper title to be in Oliver Grace, who purchased from the patentee in 1810, and appeared never to have parted with his interest. The next record was a deed in 1820 from one Wm. McGinnis, whose title was not apparent, to one Meigham. In 1831 the property passed by deed from Meigham to R. W. Prentice; in 1833 by deed from Prentice to Jarvis. As these three last deeds were not produced it did not appear whether or not they contained a bar of dower. In 1823 Meigham gave a mortgage to J. Spragge and Wm. Hutchinson, no discharge of which was registered. In 1839 Jarvis conveyed to Michael Crawford through whom the petitioner claimed. From that time Crawford or those claiming under him had been in possession, and previous to Crawford's possession, the lands had been a state of nature or nearly so. The land of which the petitioner had been in possession since 1863 was not an entire lot, a portion having been conveyed by Crawford to the Hamilton & Toronto Railway Co. in 1853. Crawford made an affidavit, stating that during his possession no demand had been made for any part of the mortgage debt under the mortgage from Meigham to Spragge and Hutchinson: that he never paid anything on account of the same, nor ever had given any written acknowledgment of the right of any person or persons, thereto signed by himself, or any person as agent for him: and that no demand was ever made for dower by the wives of McGinnis, Meigham or Prentice, and that he did not even know that they had wives.

Mowat, V. C.—To make out a title by prescription where the proceeding is *ex parte*, the evidence should be clear, strong and satisfactory. It should be by more than one independent witness, and should shew that the possession was of the whole lot, as it had been decided in several cases in the Queen's Bench† that possession of part does not give a title by prescription to the whole lot. Unless the evidence for this purpose is clear, it should be given *vivâ voce* and before a judge. But the testimony of a single witness in the loose and general terms of Michael Crawford's affidavit would never do.

The rule hitherto acted upon, and which it seems most important to observe is to require notice to be given to the person having the paper title, where a title is claimed in opposition to it by prescription, the notice being prepared and signed by the Referee. To dispense with the necessity of this notice there should be due search for the person having the apparent paper

* We have unearthed the following judgment, which it appears has not yet been reported, and publish it for the benefit of practitioners. The points decided are important, and the case is an authority with the Referee.—Eds. L. J.

† See *Hunter* v. *Farr et al.*, 23 U. C. Q. B. 324; *Dundas* v. *Johnston et al.* 24 U. C. Q. B. 550; *Young et al.* v. *Elliott et al.*, 25 U. C. Q. B. 334.—Eds. L. J.

title, and it should be shewn by affidavit that nothing can be ascertained of him or his heirs. Here Oliver Grace appears as owner, and he or his family may be well-known, for all that appears on the papers. Inquiry about him should be made with such diligence as the case admits of, and as to his representatives. Amongst other things a search at the Probate office should not be omitted.

If the search proves fruitless and is shewn to have been so, the possession should be shewn to have been long enough against him, even though he had no notice of the possession; or there should be proof of his having been aware thereof.

There is no evidence of search for the following deeds, of which the names are put in evidence and the evidence necessary to let in secondary evidence at *Nisi Prius* is necessary here. I refer to the deeds, McGinnis to Meighan, Meighan to Prentice, and Prentice to Jarvis.

Evidence should also be given to dispense with notice to Spragge and Hutchinson. Some one in Montreal, acquainted with the business people there forty years ago, can no doubt be found, who may know something of them. If they are dead search should be made in the Probate office for will or administration.

If not ascertained to be dead, and not known what has become of them, notice to them may be dispensed with, in view of the long time that has elapsed. A single *ex parte* affidavit that no payment or demand has taken place within the twenty years, is not alone sufficient to bar the claim of mortgagees who can be served with notice. But if they cannot be served with notice, I may properly, I think, presume satisfaction.

If these difficulties are removed, the certificate will be subject to any dower of Mrs. McGinnis, to the taxes of 1868, and the particulars reserved by the 17th clause of the Statute for Quieting Titles, as also to Crown bonds.

NOVA SCOTIA.

SUPREME COURT.

(*Reported by* W. H. Meagher, Esq., *Barrister-at-Law.*)

In re W. L. Dodge & Co., Insolvents, and Thomas G. Budd, an Insolvent.

Insolvency—Partners—Proving on notes.

Held, on the bankruptcy of a firm, that promissory notes drawn by the firm in favor of, and endorsed by one of its members, do not entitle the holders who were cognizant of the connection of the parties, to prove against both estates, but they may elect against which estate to prove.

Held, also, that proof may be abandoned before dividend paid.

[Halifax, November 30, 1871.]

In this case the Bank of British North America, at the time of the insolvency of W. L Dodge & Co., and of Thos. Budd, held a note made by the former, and endorsed by the latter in his individual character, he being a member of the firm of W. L. Dodge & Co., of which the Bank was cognizant. The judge of Probate having decided that the Bank was entitled to rank upon the estate of the firm, and also upon that of Thomas G. Budd, for the full amount of the debt due that institution on the note above mentioned, an appeal was asserted by Messrs. J. T Gilchrist & Son, creditors of Budd, on the ground that the Bank had no right to rank upon both estates, but must elect on which to rank, and having proved against the estate of the firm, must be held to his election, and is precluded from proving against the separate estate of Budd, until his separate creditors should have been paid in full; and, on the argument, their counsel relied on a rule to that effect which prevailed in England in cases of bankruptcy, and should prevail here, as he contended, in cases of insolvency.

On the part of the Bank it was contended that the rule referred to did not extend to such a case as this, and that if it did so in England, our courts were not to be bound by it in carrying out the provisions of the Dominion Insolvent Act, especially as English judges, who felt themselves bound by it, had characterized it as inequitable and arbitrary, and the Legislature, in the English Bankrupt Act (24 & 25 Vic. cap. 134 sec. 152) had introduced a different rule. It was further contended that, if the rule should be held to prevail here, the Bank, though its debt had been proved against the estate of the firm, has the option of abandoning that proof and resorting to the individual estate of Budd, as no dividends had been received, and in fact none had been declared.

C. B. Bullock for the appellants.

James Thomson for the Bank of British North America.

Ritchie, J.—The general rule of commercial law as to the application of joint and separate property of partners is, that the joint estate shall be applied to the joint debts, and the separate, to the separate debts, and the surplus of each reciprocally to the creditors remaining on the others; and if this were the only rule applicable to the case, the Bank of B. N. America would be entitled as the creditor of W. L. Dodge & Co, the makers of the note, to rank on the assets of the firm, and as the creditors of Budd, the endorser, on his individual assets, of course only to the extent of 20s. in the pound in the whole, from both estates; but in the case of bankrupt estates, a rule has been adopted by the English courts that a creditor who had a joint and several security for his debt was not entitled to double proof against the joint and separate estates, whether the debt was secured by the same or by two independent instruments. It is true, doubts have existed as to the extent to which the rule should be carried, and it has been found difficult to assign very satisfactory reasons for its adoption in the first instance, and judges, who have felt themselves compelled to yield to this authority, have sometimes questioned its wisdom; but, after a thorough investigation, it has received the sanction of the highest judicial tribunal of England in *Goldsmid* v. *Cazenove*, 7 H. L Cas. 785. That case was first argued before Knight Bruce and Turner, Lords Justices (See *Ex parte Goldsmid*, 1 DeG. & J. 283) who differed in opinion on the question. Knight Bruce, L. J., after referring to decisions recognizing the validity of the rule, especially *Ex parte Moult*, 2 Deac. & Ch. 419, and *Ex parte Hinton*, DeGex

550,—the latter a case decided by himself as Vice-Chancellor under the authority of previous decisions,—uses this strong language "thinking myself now at liberty (as when Vice-Chancellor I did not) to decline being bound by *Ex parte Moult* and *Vanzeller*, and holding myself free to depart from *Ex parte Hinton*, I avow my opinion to be, that abstract justice, and the principles of commercial law, and general jurisprudence are with the petitioners, and that the law of England is not opposed to them." In *Ex parte Moult* it had been decided that the holders of a bill, the indorser and the acceptors of it being members of the same firm, were not entitled to double proof; and *Ex parte Hinton*, where three partners of a firm of six carried on a distinct trade by partnership and indorsed a promissory note made by the six, which was discounted by a person who believed at the time that the three were partners in the aggregate firm, but the funds were distinct, it was held that the creditor was not entitled to double proof. Lord Justice Turner on the other hand, recognized the authority of these cases as decisions of equal validity with their own, and having so long governed the practice of bankruptcy he would not venture to disturb them, and added if this must be disturbed at all, it should be by a higher authority, that of the House of Lords.

On the case coming before the House of Lords, it was very fully argued by eminent counsel, and it was admitted by the counsel for the appellant that there could not be double proof, when one of the two firms on the bill consisted of a single person, who was also a member of the joint firm, as in the present instance, and Lord Campbell in his judgment said, "I have come to the conclusion that *Ex parte Moult* ought not to be overturned and the counsel for the appellant have been unable to distinguish upon principle between that case and *Ex parte Hinton*. I think Lord Justice Knight Bruce when Vice-Chancellor properly decided *Ex parte Hinton*, and he did well in considering *Ex parte Moult* as a sound authority"—the other law lords concurred. I might mention that the case of *Ex parte Bank of England*, 2 Rose 82, decided some time previously is directly applicable to the case before me. There, Graves, Sharp and Fisher endorsed a bill to their partner, Fisher, who was a distinct trader, and he discounted the bill with the Bank of England, the Bank requiring and obtaining his endorsement, and thereby raising a contract for double security, yet it was held that the Bank was not entitled to double proof, but must elect.

The law being clearly established in England by these decisions, are our courts to be governed by it in carrying out the provisions of our Insolvent Act? The rule in question is not one depending on legislation, but was established by English judges on principles supposed to be applicable to distribution of insolvent estates, and it is as applicable to the Insolvent Act of 1869 as to the Bankrupt Acts of England, though it is not to be found enacted in either; for the provisions of our act, referred to on the argument, do not seem to me to touch the question: Section 56, certainly has no bearing on it, and section 64 does not refer to a case like this, where one creditor has the joint security of a firm, and the several security of one of the partners for his debt, but generally provides for the distribution of assets where an insolvent owes debts both individually and as the member of a firm.

The applicability of the rule to other cases than those under the Bankruptcy Act of England, came in question in *Goldsmid's case*, for there, while one of the estates had become bankrupt in England, the other had been declared insolvent under proceedings in the nature of a bankruptcy in a foreign country, and it was contended that the rule would not apply, but the court assumed that the proceedings in the insolvency were in their nature analogous and tantamount to an English bankruptcy; and it was held that the case was to be decided upon the footing of English law. The case of *Rolfe and Bank of Australasia* v. *Flower, Salting & Co.*, L. R. P. C. 1 vol. p. 27, is still more to the point. This was an appeal from a decision on the Insolvent Act of Victoria; and it was contended there, as in the present case, that the estates were to be administered under the insolvent law of the colony, and under an act which contains various provisions different from the Bankrupt law of England, especially in reference to the proof of joint and separate debts, and that the English rule, the adoption of which was urged on the court in that case, has been laid down without any consideration of its justice or expediency and was most unjust in its operation. Lord Chelmsford in giving the judgment of the court, page 47, said, "too much reliance was placed upon the notion that the Colonial Legislature was impressed with a sense of the injustice of the rule prevailing in England, and were determined to guard against it in their new code of insolvent law," but if this was the case, "and it was the object of the Colonial Legislature to prevent the operation of the rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in a single section of the Act, it is just as reasonable to suppose that knowing the rule established in England, which is not founded upon any statute but upon general principles applicable to many other cases, they did not intend to disturb it." The same reasoning applies to the case before me and under the authority of the case I have referred to, I can arrive at no other conclusion than that the Bank of B. N. America is not entitled to double proof: but as no dividends have been received or declared, the proof on the joint estate of W. L. Dodge & Co., may be abandoned, and the Bank may elect to resort to the separate estate of Budd.

As the effect of my judgment is to reverse that of the judge of Probate and Insolvency, and the question involved is a new one under the Insolvent Act, and the contention of the appellant has not been wholly sustained, there should be no costs.

ENGLISH REPORTS.

CHANCERY.

Pike v. Dickenson.

Settled account—Bill for account—Composition deed—Jurisdiction—Fraud.

A debtor executed a composition deed under the Bankruptcy Act 1861, whereby he covenanted to pay his creditors a composition of 8s. in the pound. The deed was duly registered and assented to by the required majority of creditors. Subsequently a person who had acted as the debtor's agent in certain business transactions claimed to be his creditor for £300, and his name was entered as a creditor for that amount in the schedule to the deed, and he received the composition on it.

The debtor, having afterwards discovered several fraudulent overcharges in his agent's account, filed a bill for an account:

Held, that he was entitled to a decree for an account notwithstanding the composition deed.

[24 L. T. Rep. N. S. 927.]

This was a suit instituted for the purpose of obtaining from the defendant an account of shipments of hops, and of moneys paid and received in respect thereof by the defendant as agent for the plaintiff, who was a hop merchant.

In July, 1867, prior to which date the shipments in question had taken place, the plaintiff, having fallen into pecuniary difficulties, called a meeting of his creditors and agreed to pay them a composition of 8s. in the pound.

A composition deed, dated the 24th July, 1867, was accordingly executed; it was assented to by the requisite majority of the creditors, and registered under the Bankruptcy Act 1861, but it did not contain an assignment of property.

The defendant was not present at the meeting of the creditors, but he afterwards asserted that he had a claim against the plaintiff, on the shipments in question, for £300; and the plaintiff accordingly entered him as a creditor for that amount in the schedule to the deed, and paid him the composition on it.

Having subsequently discovered that there were many inaccuracies and overcharges in the account furnished by the defendant, the plaintiff filed his bill for an account.

The facts of the case will be found more fully stated in his lordship's judgment, which was in writing.

Jessel, Q.C., and *W. F. Robinson*, for the plaintiff, submitted that as the account contained fraudulent overcharges, the plaintiff was entitled to have it opened.

Swanston, Q.C., *H. M. Jackson*, and the Hon. *E. Romilly*, for the defendant.—This is not a case in which the Court of Chancery will grant relief, as the plaintiff has executed a composition deed. His relief, if he have any, must be obtained in the Court of Bankruptcy. It may be urged that the Court of Chancery has concurrent jurisdiction in these cases, but it is quite settled that it does not interfere in such cases except when the Court of Bankruptcy cannot give adequate relief: *Stone* v. *Thomas*, 22 L. T. Rep. N. S. 359, L. Rep. 5 Ch. 219; *Phillips* v. *Furber*, 22 L. T. Rep. N. S. 288, 707; L. Rep. 5 Ch. 746. But the Court of Bankruptcy has ample power to give relief under the 197th section of the Bankruptcy Act 1861. And the fact that the composition deed in this instance does not contain any assignment of property makes no difference, for in *Re Marks' Trust Deed* (15 L. T. Rep. N. S. 139; L. Rep. 1 Ch. 429), it was held that the 197th section of the Bankruptcy Act 1861, giving the court power under a registered deed to make the same orders as if the debtor was bankrupt, is not confined to deeds assigning property of the debtor. Again, to obtain a decree in this suit for an account, the plaintiff must offer to pay the defendant the whole amount which may be found due to him; the account may turn out in favour of the defendant, and it would not be fair to the plaintiff's other creditors that the defendant should be paid in full. Nor would it be just if the accounts should turn out in favour of the plaintiff, to allow him to recover the amount found due to him from the defendant for his own purposes. The other creditors would not have accepted such a small composition had they known that the defendant was a debtor and not a creditor of the plaintiff. For all these reasons this is a case for the Court of Bankruptcy, which can have all the creditors before it, and has jurisdiction to deal with the application of any sum which may be found due from the defendant to the plaintiff. They also referred to *Martin* v. *Powning*, 20 L. T. Rep. N. S. 133, L. Rep. 4 Ch. 356; *Lancaster* v. *Elce*, 7 L. T. Rep. N. S. 123, 31 L. J. Ch. 789; and *Willis* v. *Jernegan*, 2 Atk. 251.

Jessel, Q.C., in reply—The other creditors of the plaintiff have no concern in this question. They agreed to accept a composition of 8s. in the pound without knowing anything about the defendant's claim against the plaintiff, and it was not till after the execution of the composition deed that the defendant made his claim, and was entered as a creditor in the schedule. The arrangement made between the defendant and the plaintiff was a distinct and separate one, and the other creditors have no interest in the matter. The fraudulent overcharges contained in the defendant's account entitled the plaintiff to have it re-opened, and this can be done without setting aside the composition deed. This is clearly a case for relief in equity; the Court of Bankruptcy cannot grant the relief sought; for it cannot compel the creditor of a bankrupt to pay anything; it can only expunge his claim.

In answer to a suggestion made by Lord Romilly,

Jessel said that the plaintiff was not prepared to give an undertaking to divide amongst his creditors any sum which he might recover in this suit.

May 22.—Lord Romilly.—This is a suit instituted to obtain an account of shipments of hops and moneys paid and received by the defendant in respect thereof, on behalf of the plaintiff. The facts are peculiar. In and prior to 1863, and from that time down to the month of July, 1867, the plaintiff carried on business as a hop merchant at Oxford and also at Southwark. He bought large quantities of hops on speculation and consigned them to various places and persons abroad, and for that purpose he employed the defendant, who was and is a commission merchant, carrying on business in London, to act as his agent at a commission of 2½ per cent., besides regular expenses and charges. In 1867

the plaintiff got into difficulties and made a composition with his creditors, and accordingly on the 24th July, 1867, he executed an indenture made between himself of the first part, Thomas Viner of the second part, Robert Symons of the third part, James Boffin of the fourth part, and Nathaniel Humphreys of the fifth part, and the various creditors, whose names appear in the schedule, of the sixth part, whereby, after reciting that the plaintiff was unable to pay his creditor in full, and that he had proposed to pay to them 8s. in the pound, by four instalments of 2s., at intervals of three months each from the 10th July, 1867, and that three-fourths of all the creditors whose debts amounted to £10 and upwards had agreed to accept this composition; the deed proceeded to carry this proposal into execution, and by it the plaintiff covenanted that after registration of the deed under the 192nd section of the Bankruptcy Act of 1861, he, the plaintiff, would deliver to Nathaniel Humphreys promissory notes for the payment of the instalments, and Viner, Symons, and Boffin, severally for themselves and their respective executors and administrators, covenanted that, if not paid one month after notice of default in payment of these promissory notes, they would pay to each of the creditors of the sixth part in the schedule mentioned the amount of the other instalments due to the creditors on the sums set opposite to their names in the schedule, and thereupon by the said deed the creditors of the sixth part released the plaintiff from the debts due to them and from all actions, suits, and demands, with a proviso that if they failed the release should be null and void. This deed was duly registered in bankruptcy. While this deed was in preparation, and after the meeting of the plaintiff's creditors, the plaintiff met the defendant, who stated that he was a creditor of the plaintiff, and on being asked the amount due to him, said he could not state it exactly then, but, as far as he could make it out at that time, it amounted to £300. Thereupon the defendant's name was put down as a creditor for £300, and he received the composition accordingly, and duly executed the deed. The bill then states that according to subsequent investigation the plaintiff had discovered that in the series of the accounts rendered by the defendant and plaintiff, in respect to their transactions prior to the date of the deed, the defendant had charged the plaintiff with sums exceeding what he had paid on his account; and I regret to say that the evidence given in this cause fully establishes the truth of this charge. The evidence is given compulsorily, but John Brown, ship and insurance agent, and Thomas James Devitt, ship and insurance broker, by their evidence fully established these facts. Thus in one case, for example, where the defendant paid £13 9s 7d. he charged the plaintiff as having paid £20 0s. 8d., and in another case, where the defendant had paid £17 10s. 11d., he charged the plaintiff with £25 1s. 9d. as paid on his account. It is not necessary to multiply instances of this, of which there are several. The result is inevitable, that when such conduct as this is proved, the account must be re-opened; and, indeed, from the first moment that this fact was established to my conviction, I only hesitated as to the mode by which and the conditions under which, I should adopt this course. The deed of composition seemed to present a considerable difficulty, because, unquestionably, if instead of £300 being due to the defendant, a large sum of money had been due from him, the state of the plaintiff's assets would have been materially altered, and the creditors might properly have refused to take so small a composition as 8s. in the pound. Accordingly I made some suggestion to the plaintiff's counsel to meet this difficulty, but after turning the thing over in my mind I have been unable to come to any satisfactory conclusion respecting it; and upon the whole I have thought that I should be creating expense and not doing anything effectual if I meddled with it, and that I had better leave the matter to be dealt with by the scheduled creditors, parties to the deed of the 24th of July, 1867, as they might think fit, if indeed they could do so at all. But I felt it impossible to allow such accounts, affected by such evidence, to go unnoticed, when brought in due form before the attention of a court of equity. I have accordingly determined to take no notice whatever of the deed of composition of the 24th July, 1867, and I shall simply direct an account to be taken of all dealings and transactions between the plaintiff and the defendant up to the 24th July, 1867, including therein all receipts and payments subsequent to that period in respect of transactions begun previously to that period; and if, in the course of taking such account, it shall appear that any account was settled between the plaintiff and the defendant, then that leave shall be given to either party to surcharge and falsify such accounts or any items therein. I reserve further consideration, and make a special reservation of the costs of the suit up to and including the hearing. I do this because, if the account should turn out favourable to the defendant, I should not be disposed to give him costs up to and including the hearing, in a case where such facts have been proved as I have mentioned, and in consequence of which alone I pronounce the above-mentioned decree.

MIDDLESEX SESSIONS.

Reg. v. Taylor and Smith.

Conspiracy—Evidence.

Prisoners were indicted for conspiring to commit larceny. A second count charged an attempt to commit a larceny.

The evidence was that the two prisoners, with another boy, were seen by a policeman to sit together on some door-step near a crowd, and when a well-dressed person came up to see what was going on, one of the prisoners made a sign to the others, and two of them got up and followed the person into the crowd. One of them was seen to lift the tail of the coat of a man, as if to ascertain if there was anything in the pocket, but making no visible attempt to pick the pocket; and to place a hand against the dress of a woman, but no actual attempt to insert the hand into the pocket was observed. Then they returned to the door-step and resumed their seats. They repeated this two or three times. There was no proof of any preconcert, other than this proceeding.

Held, not to be sufficient evidence of a conspiracy.

Held, also, not to be evidence of an attempt to steal.

[25 L. T. N. S. 75.]

The prisoners were indicted for conspiring together to commit larceny from the person of Her Majesty's subjects.

Another count in the indictment charged an attempt to commit a larceny.

Moody for the prosecution.

It was proved by two detective officers that a crowd was collected in the street, that the prisoners, with another boy, were sitting on a door-step; that when a well-dressed man or woman went to look into the crowd one of the prisoners nudged the others, whereupon two of them rose and followed that person. In the case of a man, they were seen to lift his coat-tail, as if to ascertain if there was anything in his pocket; but they did not attempt to insert a hand in the pocket. In the case of a woman, they went and stood by her side; the hand of one of the prisoners were seen to go against her gown, but it was not seen as attempted to be thrust into her pocket, nor was any complaint made by these persons of any such attempt.

Mr. Serjt. Cox.—There is no evidence either of a conspiracy or of an attempt to steal. To constitute an attempt, some act must be done towards the complete offence. Feeling a coat-tail to ascertain if there is anything in the pocket is not an attempt to do the act of picking a pocket, for it may be that nothing was found to be in it, and therefore they did not proceed to the commission of the act itself; and if there was nothing in the pocket, even putting the hand into it has been held not to be an attempt to steal. But here there is not any proof that the pocket either of the man or woman contained anything, or indeed that they had any pockets at all

Moody—But the count for conspiracy meets this objection. It charges them with conspiring together to commit larceny, which is an indictable offence, and it will be for the jury to say if being together and acting together in the manner described is not evidence that they had concocted a system of robbery.

Mr. Serjt. Cox.—To sustain a charge of conspiracy there must be evidence of concert to do the illegal act. In cases of treason, where the law of conspiracy has been most frequently applied, some evidence has usually been given of something said or done by the defendants previously to the commission or attempted commission of the act for which they have conspired, from which the conspiracy may be inferred. The peculiarity of this case is that the only evidence of conspiracy is the act itself, and the manner in which it was done. But then, according to the view which I have just taken of the act itself, it was not illegal, because it did not amount to an attempt to pick pockets. It appears to me to be impossible to say that the doing of an act not illegal is evidence of a conspiracy to do an illegal act, there being no other evidence of the conspiracy than the act so done. I cannot allow the case to go to the jury. The point is a very nice one, and, I think, quite new; but I am so clearly of opinion that, whatever may be the suspicions as to the intentions of the prisoners, there is not sufficient evidence to justify their conviction, that I cannot reserve it.

Not Guilty.

REVIEWS.

Our Fireside Friend: A new Chicago venture, that covers the same ground in illustration and letterpress as the *New York Ledger*. We have found some amusement in looking over its columns. "*Bandy Tag*" commences in the most thrilling manner, though we notice the author rather confuses the functions of *shuttlecocks* and *battledores*. This story is probably quite as objectionable as the ordinary run of American works of fiction. The verses on "The Burning of Chicago," by Will. M. Carleton, fully sustain the reputation of that young, though widely-known poet.

One graphic couplet refers to the attempt of some enterprising citizen of the baser sort to set fire to a row of houses on his own account:

"The best line of action to follow, for yonder unprincipled scamp,
Is simply a line of stout cordage—one end on the post of a lamp!"

The United States Jurist. Washington, D.C.: W. H. & O. H. Morrison, Publishers. Vol. ii., No. 1.

We have to notice this handsome legal periodical, which with this number is changed from a monthly to a quarterly law magazine. It is edited by James Schouler, the accomplished author of the late Treatise on Domestic Relations, which has already been cited with approval in the English Courts. This issue runs to 104 pages, and the contents are varied as follows: I. Judicial reforms by Mr. Justice Miller. II. Quarterly Table of Criticised Cases. III. Annual Digest of Federal decisions. IV. Quarterly Digest of English decisions. V. Book notices. VI. U. S. Supreme Court Calendar. VII. Legal intelligence. The paper on criticised cases is a new feature, but one which is capable of being worked to great profit. The book notices are pointedly written, and so far as we can judge with a bold determination to do even-handed justice on all sides: to condemn or commend as the merits or demerits demand. The paper of Judge Miller is an earnest protest against delay in the administration of justice—a comment upon the text that tardy justice is often the greatest injustice. He calculates that on an average there is a delay of three years in cases appealed to the Supreme Court, between the time when judgment is rendered in the

Court below and the time when it reaches that court again for execution, if it be affirmed with no unusual delay. Means are suggested whereby sound legislation may remedy this state of affairs, but our space will not allow us to draw further from this very suggestive article.

BOOKS RECEIVED.

To be noticed hereafter.

Ewart's Index of the Statutes (being an alphabetical index of all the Public Statutes passed by the late Province of Canada and the Dominion and Ontario, up to and inclusive of the year 1871. Rowsell & Hutchison.

A most useful help to the practising lawyer.

Canadian Monthly and National Review. January and February, 1872, Vol. I., Nos. 1, 2. Toronto: Adam, Stevenson & Co.

Revue Critique, January, 1871. Dawson Bros., Montreal.

British Quarterly Review.

Edinburgh Review.

Blackwood's Magazine, January, 1872. The Leonard Scott Publishing Co., 140 Fulton Street, New York.

American Trade Mark Cases, by Rowland Cox, Esq., Counsellor-at-Law, Washington, D. C.

APPOINTMENTS TO OFFICE.

CORONERS.

BENJAMIN THOMAS McGHIE, Esq., M.D., to be an Associate Coroner for the United Counties of Leeds and Grenville; HUGH ALEX. MABEE, Esq., M. D., to be an Associate Coroner for the County of Norfolk. (Gazetted Nov. 25th, 1871.)

WILLIAM R. CHAMBERLAIN, Esq., to be an Associate Coroner for the County of Lennox and Addington. (Gazetted Dec. 23rd, 1871.)

NOTARIES PUBLIC FOR ONTARIO.

JOHN G RIDOUT, MARTIN H. L. GORDON, and GEORGE KERR, Jun., of the City of Toronto; JOHN R. KIRCHOFFER, of the Town of Port Hope; and DAVID THOMAS DUNCOMBE, of the Town of Simcoe, Esquires, Barristers-at-Law. (Gazetted Dec. 2, 1871.)

WILLIAM PORTE, of the Village of Lucan, Esq., and JOHN WINCHESTER, of the City of Toronto, Attorney-at-Law. (Gazetted Dec. 9th, 1871.)

JOHN BAIN, of the City of Toronto, and THOMAS MAITLAND GROVER, of the Village of Norwood, Esqs., Barristers-at-Law. (Gazetted Dec. 30th, 1871.)

JOHN ROBISON CARTWRIGHT, of the Town of Port Hope, GEORGE CHRISTIE GIBBONS and HUGH MACMAHON, of the City of London, JAS. STRACHAN CARTWRIGHT, of the Town of Napanee, and THOMAS MAITLAND GROVER, of the Village of Norwood, Esqs., Barristers-at-Law, and SAMUEL BARTON BURDETT, of the Town of Belleville, Gentleman, Attorney-at-Law. (Gazetted Jan. 6, 1872.)

COUNTY ATTORNEY.

EDWARD GEORGE MALLOCH, of the Town of Perth, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace in and for the County of Lanark, in the room and stead of Donald Fraser, Esquire, deceased. (Gazetted Jan. 6, 1872.)

DEPUTY CLERK OF THE CROWN.

IVAN O'BEIRNE, of the Town of Peterborough, Esq., to be Deputy Clerk of the Crown and Clerk of the County Court of the County of Peterborough, in the room and stead of Thomas Fortye, Esquire, deceased. (Gazetted Jan. 6, 1872.)

SPRING CIRCUITS, 1872.

EASTERN CIRCUIT.

(Hon. Mr. Justice Morrison.)

Brockville	Wednesday	13th March.
Perth	Tuesday	19th March.
Kingston	Monday	25th March.
Ottawa	Monday	8th April.
Cornwall	Tuesday	23rd April.
L'Orignal	Tuesday	7th May.
Pembroke	Tuesday	14th May

MIDLAND DISTRICT.

(Hon. Mr. Justice Wilson)

Napanee	Wednesday	13th March.
Belleville	Monday	18th March.
Cobourg	Monday	1st April.
Peterborough	Monday	15th April.
Lindsay	Monday	22nd April.
Whitby	Tuesday	30th April.
Picton	Tuesday	7th May

NIAGARA CIRCUIT.

Barrie	Wednesday	13th March.
St. Catharines	Tuesday	12th March.
Welland	Monday	18th March.
Hamilton	Thursday	4th April.
Milton	Tuesday	23rd April.
Owen Sound	Monday	13th May.

OXFORD CIRCUIT.

(Hon. Mr. Justice Gwynne.)

Cayuga	Thursday	21st March.
Simcoe	Monday	25th March.
Brantford	Tuesday	2nd April.
Berlin	Wednesday	10th April.
Stratford	Monday	15th April.
Guelph	Monday	22nd April.
Woodstock	Tuesday	7th May.

WESTERN CIRCUIT.

(Hon. Mr. Justice Galt.)

London	Monday	25th March.
St. Thomas	Tuesday	9th April.
Chatham	Tuesday	16th April.
Sarnia	Tuesday	23rd April.
Sandwich	Tuesday	30th April.
Goderich	Monday	6th May.
Walkerton	Tuesday	14th May.

HOME CIRCUIT.

(The Hon. the Chief Justice of the Common Pleas.)

Brampton	Wednesday	13th March.
Toronto	Tuesday	19th March.

DIARY FOR MARCH.

1. Fri... *St. David.*
3. SUN.. *3rd Sunday in Lent.*
6. Wed.. Name of York changed to Toronto, 1834.
10. SUN.. *4th Sunday in Lent.*
13. Tues.. General Sess. and County Ct. sittings in York.
17. SUN.. *Passion Sunday. St. Patrick.*
21. Thur . *Benedict.*
24. SUN.. *Palm Sunday.*
25. Mon.. *Annunciation.*
29. Fri... *Good Friday.*
31. SUN.. *Easter Sunday.*

THE

Canada Law Journal.

MARCH, 1872.

Subscribers to the *Law Journal* will receive with the present number the Index to the last volume, and a Table of Cases, including not only those reported in full, but also those contained in the Digest of the English Law Reports.

The last feature, now introduced for the first time, will greatly facilitate a reference to the important cases contained in this Digest, which, embracing as it does all the English decisions of more than local interest, has, we are glad to learn, already proved of great service to many of our readers. The Table of Titles contained in this Digest, formerly printed separately, is this year included in the General Index, which, as it has been prepared with unusual care, will, we trust, be found more complete and useful than heretofore.

The proceedings of the Benchers of the Law Society during last Hilary Term, including an abstract of the Balance Sheet for 1871, are published in another place.

The *Goodhue Case* was re-heard before the Court of Appeal, on the 11th instant. Judgment will probably not be given before Sept. next. All the judges were present except the learned Chief Justice of Ontario. Mr. Christopher Robinson, Q.C., who led for the appellants, made a concise, but very masterly argument against the constitutionality of the Act which has given rise to the suits now under adjudication.

It is said that the following Barristers will shortly be gazetted as Queen's Counsel:—Dr. McMichael, Mr. C. S. Patterson, Mr. J. T. Anderson, Mr. Thomas Moss, and Mr. Samuel H. Blake, of Toronto; Hon. E. B. Wood, of Brantford; and Mr. Proudfoot, of Hamilton.

When speaking with reference to the case of *In re Dodge et al., Insolvents*, decided in the Supreme Court of Nova Scotia, (see pp. 29, 51 *ante*) we omitted to refer to the recent case of *In re Chaffey*, 30 U.C.Q.B. 64 (and see a note of this case in 7 L. C. G. 7); Mr. Justice Wilson in delivering judgment saying, "They (the creditors holding a note made by the firm and endorsed by one of its members) must elect to prove upon one estate or the other. They cannot rank on both. And in our opinion, sec. 5, sub-sec. 7 of the Insolvent Act of 1864, directly favors and directly decides this question." We had intended to refer further to the Nova Scotia Case, but want of space forbids at present.

From statistics published in the English *Law Journal*, it appears the House of Lords heard 49 appeals during 1870, as against 26 heard in 1869. Of the 49, 20 were successful. During the session of 1870, 48 appeals were presented; of which 22 were from the Scotch Court of Session, 3 from Ireland, and, of English cases, 18 from Chancery, 4 from the Exchequer Chamber, and 2 from the Divorce Court. At present there are but 34 causes left in arrear.

Figures are given in the same periodical, which enables one to contrast the state of business before the Judicial Committee of the Privy Council with that before the Lords. 138 appeals were entered during 1870; at the close of the year 336 cases were left unheard, some of which were lodged ten years ago. 61 appeals were determined during the session, of which judgment was affirmed in 28, reversed in 28, and varied in four. It is to be hoped that the reconstruction of this Council and the appointment of salaried judges will lead to greater expedition and to the clearing away of all arrearages before many years elapse.

A decision of interest to dwellers in cities was recently pronounced by the New York Court of Appeals, in *Barker* v. *Savage*, with regard to the respective right of foot-passengers and vehicles at street-crossings. It was held that each has the right of passage in common and neither the right of precedence;

consequently that each is bound to accommodate the other, so that neither should vehicles be obstructed nor foot-passengers injured in crossing at such places.

Many legal squibs are let off against the Chicago practitioners, but they can afford to bear them all, consoled by this impartial testimony from the *Chicago Legal News*: "Men who are competent to manage any case, in any court where the law and equity systems of England prevail, work on from year to year, guiding the immense interests of their clients in this great city, with as little ostentation as has characterized the incredible increase of its commerce. To such men, public office offers few attractions. Its cares are too exacting, and its rewards too small. They find in their profession an ampler field, greater honors, richer rewards, and, with them, the peace and independence of private life."

Some of the Chicago lawyers are peculiarly happy in their advertisements. They manage incidentally to give the lie to current slanders about law and religion being divorced. The testamentary practitioners recommend themselves by their touching candour to all persons well-disposed, or of disposing mind. Here for instance is the ultimate part of a card that appears in the *Legal News*:

"Special attention given to Probate Matters.
"Wills drawn and construed.
"Estates settled.
"'*Set thine house in order: for thou shalt die, and not live.*'—2 King xx, 1.

This style of religious advertisement might be judiciously extended to other branches of the profession. Thus, counsel hungering for clients could extol their own perfections by the citation: "Who is he that will plead with me? for now, if I hold my tongue, I shall give up the ghost."—Job xiii, 19. And the Indiana lawyer could herald the salient features of his practice by a pardonable adaptation of Jerem. iii, 8, "Put her away, and give her a bill of divorce."

The name of Mr. Alexander Sampson, Toronto, was accidentally omitted from the list of those who passed the second intermediate examination in Hilary Term last.

LAW SOCIETY OF ONTARIO.

Hilary Term—1872.

The following is a *resumé* of the proceedings of Convocation, during last Term, published by order of the Benchers:—

Monday, 5th February.—The Hon. J. H. Gray, a member of the Bar of Nova Scotia, was called to the Bar.

Robert Wardrope, Esq., a member of the English Bar of Lincoln's Inn, was called to the Bar.

Tuesday, 6th February.—The Treasurer called attention to the vacancy in the Bench caused by the appointment of the Hon. Adam Crooks to the office of Attorney General of Ontario.

A meeting of Benchers ordered to be had for second Friday in this Term, for election of a Bencher in place of the Hon. Mr. Crooks.

Report of Examining Committee received.

Examining Committee for next Term to be Messrs. McMichael, Read, Blake, Crickmore and Burton.

Abstract of Balance Sheet laid on the table, and Auditors' report thereon.

Abstract of Balance Sheet for 1871.

		$ c.
Income—		
	Certificate fees	10,664 70
	Call fees	3,120 00
	Admission fees	3,000 00
	Attorney Examination fees	2,200 00
	Term fees	1,096 00
	Government Warrant (fuel and lights)	3,000 00
	Reports, Sale of	277 20
	Interest on Sterling Debentures	481 34
	" Currency "	235 80
	" Bank account	260 45
	Cash, per Solicitor	52 07
		$24,390 56
Expenditure—		
	Reporters, Salaries of	7,000 00
	Reports, Printing of	3,453 50
	Salaries and Scholarships	3,530 00
	Hall	5,238 38
	Library and Office	844 38
	Lands	504 50
	Law expenses	192 10
	Election expenses	140 00
		$20,907 86
	Income less expenditure,	$ 3182 70
Outstanding Assets—		
	Cash	61 75
	Bank Deposit	15,344 57
	Debentures, Currency	4,000 00
	" Sterling	10,219 98
		$29,628 30

We have examined the accounts of which the above is an abstract, and compared the same with the vouchers, also the cash book, journal

and ledger and bank pass books, and find the same to be in all respects correct.

(Signed) Æmilius Irving, } *Auditors.*
" F. Osler, }

Toronto, 23 Jan. 1872.

Ordered, that the remuneration to the Auditors shall be fifty dollars per annum each.

Ordered, that thirty dollars per annum be paid to the publishers of the *Law Journal* for the publication of the *resumé* of the proceedings of Convocation.

Resolved, that the portion of the Report of Finance Committee of last Term affecting the Secretary and Sub-Treasurer do come into force immediately after the present Term. That Hugh Gwynne, Esq., shall continue to be nominally Secretary, Sub-Treasurer and Librarian of the Society, with a salary of two thousand dollars per annum, and the use of the rooms in the East Wing of Osgoode Hall now occupied by him. That from his salary shall be deducted a sum not exceeding one thousand dollars for the payment of a deputy. That Mr. Gwynne shall be paid at his present rate of income from his offices until the first day of July next, and that a deputy shall be appointed, whose duties shall commence immediately.

Ordered, that the election of a deputy be proceeded with on first Saturday in this Term.

Friday, 9th February.—The Intermediate Examinations for the third and fourth years were held.

Saturday, 10th Feb.—Ordered, that $1,349 65 be paid to Mr. Rowsell for balance for publication of Reports for 1871. Mr. Rowsell paying $252 for 140 volumes sold.

Ordered, that J. H. Esten, Esq., be Deputy-Secretary, Librarian and Sub-Treasurer.

Mr. Moss introduced a rule as to subjects of examination—second and third readings for last Friday in this Term.

Mr. Moss gave notice for last Friday in this Term for an instruction to the Examiners.

Mr. Moss presented a petition on the subject of opening the Library in the evening, and gave notice of motion.

Friday, 16th February.—Mr. Treasurer presented a petition from Barristers of Chatham for election of R. S. Woods, Esq., as a Bencher.

Hon. E. B. Wood, of Brantford, was elected a Bencher in the room of the Hon. Adam Crooks, appointed to the office of Attorney General of Ontario.

Mr. Benson gave notice of motion for first Friday of next Term as to appointment of officers for the future,

The names of the gentleman called to the Bar and admitted as students are published officially as usual.

J. Hillyard Cameron.
Treasurer.

ARE TELEGRAMS PRIVILEGED?

We notice that this question arose before a select committee of the Ontario Parliament, appointed to investigate charges in connection with the election for the South Riding of Grey. An officer of the Montreal Telegraph Company was subpœnaed to produce certain despatches, and the following is a report of what occurred, taken from the columns of the Toronto *Globe* of the 22nd February last:

"The Select Committee on the charges against Mr. Blake, in reference to the late election in the township of Proton, for the South Riding of the county of Grey, met again yesterday morning. Present — Messrs. Rykert (Chairman), Prince, Galbraith and Pardee.

Mr. Lauder proceeded with his case by recalling Mr. H. P. Dwight, who said he begged to decline giving any information whatever in regard to the messages referred to in his subpœna. He thought it unnecessary to give his reasons; but, on being pressed, gave the same reason as he had at the previous sitting, viz., that the law prohibited his communicating the contents of telegrams.

The Chairman said the law only prohibited his communicating the contents of messages to any person other than a court of law, or a court of enquiry appointed by the Legislature. The law would not screen him in this case.

Witness said he had been advised that it would. He had been advised by counsel. He did not object to producing the telegram from Mr. Kerr to Mr. Oliver at the last session, because both the sender and the receiver consented to that production. He should decline to produce the register of messages, because he did not think it right that the affairs of all their customers should be exposed. He declined to say who had advised him in this matter. He had not seen Mr. Kerr since the last sitting. He had the sanction of the President of his Company for the course he was taking."

Subsequently, it appears, some of the telegrams were produced, with the consent of all parties interested, and thereafter the committee reported to the House. No action was taken, although it was discussed whether the House had power to enforce production, or to punish as for a contempt. The general understanding seemed to be, that colonial Parlia-

ments had no such power. With this we have no concern at present, though it does strike one as an absurd condition of affairs that this high chamber of Parliament is more powerless than the barrister who holds a Division Court in some backwoods village of Ontario, or the most illiterate magistrate who ever scrawled J.P. after his name.

We simply consider the legal question, whether privilege was properly claimed for the documents required. We take it that parties testifying before a select committee of the House are entitled to no greater privileges than persons testifying in ordinary courts of justice. They have the same immunity from arrest, *eundo, morando et redeundo*, as other witnesses: May's Parliamentary Prac. 147. They are also protected, by privilege, from the consequences, by way of threat or action, of any statements made by them in giving evidence True it is that the Chamber in Ontario, equally with the House of Commons of England, has no inherent power to administer oaths to witnesses. By consequence neither has a committee of the local House. The English House of Commons has the inherent power of punishing, as for a breach of privilege, persons who give false evidence, who refuse to answer proper questions, and who decline for insufficient reasons to produce documents in their possession, custody or power, even when such misbehaviour occurs before a select committee: see May, pp. 405-6.

Assuming, then, that the officer of the Montreal Telegraph Company, who refused to produce the telegrams asked for, was entitled to the same protection as if he had been before any court of justice (which is indeed held in *Burnham* v. *Morrissey*, 14 Gray, 226), the question is, whether his plea of privilege was valid. It was clearly insufficient. No doubt all the acts of incorporation of these companies provide, in terms more or less explicit, against the disclosure by the company or its officers of the contents of any private message, under penalties more or less severe. The provision of our statute runs thus: "Any operator of a telegraph line, or any person employed by a telegraph company, divulging the contents of a private despatch, shall be guilty of a misdemeanor, and on conviction shall be liable to a fine not exceeding one hundred dollars, or to imprisonment for a period not exceeding three months, or both, in the discretion of the court before which the conviction is had:" Con. Stat. Can. c. 67, s. 16.

Mr. Justice Willes made short work of the objection in a case before him at Nisi Prius. A telegraph clerk having refused, under instructions from his superior officer, to produce private telegrams, or to answer questions concerning them, his Lordship said, "The only persons who can refuse to answer questions are attorneys, and of course counsel, who would stand on the same footing for a stronger reason. I do not enter into any question, whether another class is or is not privileged; I do not choose to introduce matter that is doubtful; but, with the exception, perhaps, of people in government offices as to matters of state, and counsel and attorneys, I do not know of any class that is privileged. It is quite clear that telegraph companies are not privileged." And then, addressing the witness, he proceeded: "If you did not produce those papers, everybody connected with the telegraph company, who could lay his hand on them, would be subject to be brought here, and to be punished for not producing them." The telegram was then read: *Ince's Case*, 20 Law Times, N. S. 421, May, 1869. Another case, to the same effect, of colonial authority, being the decision of the Chief Justice of Newfoundland, is to be found in 8 Jur. N. S. Part ii. p. 181. The Chief Justice, after referring to an analogous case of *Lee qui tam* v. *Birrell*, 3 Camp. 337, said: "I do not entertain a doubt that the communications or messages through the telegraph offices are not in law privileged communications; and that when the operators are compelled to attend a judicial proceeding, they are bound to disclose the contents of such messages; and that in so doing, they do not violate any oath of secrecy they have taken (that they will not *wilfully* divulge, &c.), or subject themselves to any prosecution under the statute." The rule is the same in the United States: *Henisler* v. *Freedman*, 2 Parsons, 274; as well as in the Province of Quebec: *Leslie* v. *Harvey*, 15 L. C. Jur. 9, where it was also held that such messages are not privileged. In truth, the wonder is that any one should ever have supposed that a disclosure of telegraphic messages by a witness in a court of justice, should expose him to a penalty under the statute for divulging the secrets of the office.

PROFESSIONAL ETIQUETTE.

The Tichborne case seems likely to be a *cause cèlèbre* in more ways than one.

Besides the importance of the stake, the romantic character of the claimant's story, and the immense time taken up by the trial, there was in the evidence adduced a succession of surprises, enough in themselves even without the startling and unexpected *denouement*, to render the case a memorable and notorious one.

We are sorry, however, to see that startling episodes were not confined to the evidence, but occurred even in the speeches of counsel. To us in Canada, with our colonial reverence for the Bench and Bar of the mother country, the Attorney-General's speech has been in many ways a surprise, and in some respects a most unpleasant one.

We can remember the amusement with which from a professional point of view we witnessed Mr. Pickwick's astonishment and horror when Mr. Serjeant Buzfuz, counsel for the plaintiff in *Bardell* v. *Pickwick*, presumed to tell the defendant's counsel, Mr. Serjeant Snubbin, that it was a fine morning: but had the leaders of the Bar in Mr. Pickwick's time been what at present they seem to be, he would scarcely, we think, have been startled by any such interchange of civilities between opposing counsel.

The Attorney-General seems to have made his client's cause his own in the strictest sense of the word, identifying himself with it so completely as altogether to ignore the fact that, upon every principle of law and reason, the matter, while *sub judice*, must be considered as undecided.

Assuming from the first that the claimant was an impostor, he did not hesitate to denounce him in the most unmeasured terms as the leading spirit of a vile and gigantic conspiracy; and although, from what has since transpired, the Attorney General does not seem to have been far astray in this, he certainly transgressed the bounds of professional etiquette, if not the social canons of ordinary English society, when he included by direct implication in his wholesale denunciation Mr. Serjeant Ballantine and Mr. Giffard, Q.C.

The portion of the Attorney-General's speech to which we refer is thus reported in the *Times* of February 9th:

"The Attorney-General, then resuming his speech, said he was aware that there was no limit to the possibility of facts, and there might be for all he could tell some triumphant explanation of the two facts which he had had to communicate that morning. He should have thought in any other case but the 'Tichborne case' that the fact of one of the attorneys and his son retiring from it, that the production of a letter written by the plaintiff beginning 'My dear and beloved sister,' addressed by the plaintiff to the sister of Arthur Orton, and signed with a forged address—because it was plain, as it had been read, that the writer never saw the person whom he proposed to introduce till long after he had left Australia—and with a forged date, because the writer had never seen Stephens at all until months after 1866: these facts, in any other than the Tichborne case would be thought conclusive as against the plaintiff; but in this case ordinary rules of action did not seem to apply. The day before, the speaker said he heard that his proof against Roger Tichborne ever having been at Melipilla was in favour of the plaintiff; that it might, indeed, be a slight suggestion in favour of the Orton case, but that as far so the Tichborne case was concerned it was entirely beside the case. Astonishment came upon astonishment day by day, for he had practised for some years in his profession: he had had some practice in cross-examination (a laugh), and although his powers might have been feeble in that respect, as the 'enlightened critic' suggested, yet he never met with a case like this, and he did not know that if he remained in practice for another 22 or 23 years he ever should again. His mind might be clouded by the strange mystery and obscurity in which this case was enveloped, but he should have thought that the demonstration from Roger Tichborne's handwriting that he had never been at Melipilla, or near the place, was some slight evidence that the plaintiff, who said he was there, was a rank, a gross, and an arrant impostor. But it was a mistake; it was a proof in favour of the claimant. (A laugh.) It might be that there was an answer to all these matters, but in any other cause the matters mentioned that morning would have put an end to the case. But this had not followed here. And those who conducted the plaintiff's case in the face of the arguments pressed upon them thus, and in the face of these demonstrations, must not complain if, by and by, it should be pointed out that although it was the duty, the great and sacred duty, of members of the profession to which he belonged to defend by all legitimate arguments any case which might be intrusted to them, and, although no man would stand up more indignantly than he should against the imputation which was sometimes ignorantly cast upon the Bar and

others in the profession of the law, that they should not defend persons whom they thought were guilty, or of whose guilt they had a suspicion—yet he would maintain that the duty of counsel in assisting in the prosecution of fraud was a very different thing indeed, and he would say that lawyers, whoever they might be, who, after demonstrations of the iniquity, the injustice and fraudulent character of a claim, lent themselves still to the prosecution of that claim, made themselves accomplices in the crime which they helped forward."

As the lamented Mark Tapley would have said, this is certainly "coming out remarkably strong," and it was scarcely to be expected that such insinuations would be borne in silence. Accordingly we find that later in the day Mr. Serjeant Ballantine said:

"I was not present when the Attorney-General made the observations which he thought proper to make this morning. Temper may not always be kept under control, and therefore I am not sorry that I was not present then, or I fear I might have made observations, which, not on account of their want of truth, but on account of their want of politeness, I might afterwards have regretted. * * * We were all of us perfectly well acquainted with that letter, and we had a mass of circumstances bearing upon it, and upon the case of Orton, which, when the proper time comes, will be submitted to the jury, and they will form their judgment as to whether it was possible for us to pursue any other course than the one we have adopted. The Attorney-General reminded your Lordship that he was Attorney-General, and no doubt he has been most worthily placed in that high office, but it gives him no right to impugn the honour of other members of the Bar, who have as exalted a view of their honour and character and of the strength of their principles as he can possibly have of his. I do hope, therefore, that your Lordship and the jury will protect us when we are out of court from the needless insinuations and sneers with which the Attorney-General has thought it proper to interlard his observations in the course of the enormously long speech he is delivering"

Mr. Giffard, who, it will be remembered himself came near being made Solicitor-General, was somewhat less temperate in his reply. He said:

"I claim to say a word, and I hope I shall say it temperately. What has fallen from the Attorney-General would produce the impression upon the mind of every one that it was an insinuation against the members of the Bar who were opposed to him. My learned friend has referred to his character as Attorney-General, but I venture to say that that position, which he occupies by accident, does not make him more than simply a member of the Bar, and I refuse to have my conduct judged by him."

We are sincerely glad, for the credit of the Bar, that the course which Sir John Coleridge chose to adopt, has incurred the almost unanimous disapproval of the profession; and that the foremost legal journals have administered to him a dignified and well-merited rebuke.

The *Law Times* says:

"It may fairly be expected that we should give expression to the general opinion in the profession with reference to the conflict, for such it must be called, between the Attorney-General and the counsel for the Tichborne claimant on Wednesday. The prevalent feeling and opinion is strongly opposed to the course pursued by the Attorney-General. The primary question is, Has any counsel a right to impugn the honour and integrity of counsel opposed to him on grounds such as those advanced by the Attorney-General? The learned gentleman concludes that a certain piece of evidence proves fraud, and that such evidence cannot be rebutted. He concludes further, that this conviction has also been brought home to the minds of his opponents, and he charges, them, as counsel, with being accessories in the fraud, unless they at once throw up their briefs. As interpreter, by his position, of the rules of etiquette governing the bar, Sir John Coleridge would undoubtedly be justified in expressing this view if his opinion were taken upon the point. But immediately that he constitutes himself the *censor morum* in a yet undecided cause, in which he is acting not as Attorney General, but simply as an advocate, and condemns his opponents as accessories in a fraud, unless they pursue a certain course, he frames a dangerous precedent—a precedent calculated to promote indecent displays of temper in our courts of law to the confusion of suitors and the detriment of the profession. We are not at all sure that he is right in drawing a distinction between the duties of counsel in defending a man whom he knows to be guilty, and in upholding a suit which, in his own mind, he believes to be dishonest. But to add that counsel in the latter case is to usurp the functions of the jury, and anticipate their verdict by throwing up the case, and that if he fails in this, he is a participator in the villany of his client, is to propound a principle most difficult of application, and which, if accepted, might lead to disastrous consequences.

We believe, therefore, that the protests of Serjeant Ballantine and Mr. Giffard have the cordial approval of the entire profession."

And so they should. To hold the contrary would bring deserved discredit upon the English Bar, and would open a very wide door to professional abuses of the gravest character. We trust this most unpleasant episode may, after all, be productive of good results, in establishing the rule that no counsel, however high his position, or how strong his conviction of the justice of his cause, may arrogate the right to impugn the motives or question the integrity of even the humblest of his professional brethren.

ACTS OF LAST SESSION.

We hasten to publish for the benefit of our subscribers the following Acts of last Session, in advance of their appearance in the usual course. From looking at the list, it will be seen that they are those most likely to be required for immediate reference. It seems extraordinary that the Legislature has never hit upon the idea of providing that all new laws (with an occasional exception when necessary) shall not come into force until a month or so after they are assented to.

An Act respecting the Law Society of Ontario.

Whereas, &c.: Her Majesty, &c, enacts:

1. The Benchers of the Law Society in convocation are authorized to appoint from time to time such persons, being members of the Law Society, of the degree of barrister-at-law, as they may think proper, to be editors and reporters of the decisions of the Superior Courts; who shall hold office at the pleasure of the said Benchers, and shall be amenable to them in convocation for the correct and faithful discharge of their respective duties, according to such regulations as the said Benchers shall from time to time make in respect thereof.

2. The said Benchers in convocation shall make regulations for the printing and publishing the said reports of the said decisions, and the distribution of the said reports and the price and mode of issuing thereof, and all such other regulations in respect thereto, as they may at any time consider necessary; and any profits arising from the said reports shall form part of the general funds of the Law Society.

3. The Benchers in convocation shall from time to time determine the salaries to be allowed to the said editors and reporters, and shall pay the same out of the general funds of the society.

4. The Benchers in convocation may make rules for the improvement of legal education, and may appoint readers and lecturers with salaries; and may impose fees and prescribe rules for the attendance of students and articled clerks at such readings or lectures, and for examinations thereon, as conditional to call to the bar, or admission as attorney; and may establish scholarships in connection therewith; and may for proficiency at examination, by rules to be established specially in that respect, diminish the number of years of studentship on the books of the society, or under articles of clerkship, but so as not to reduce the number of years for call to the bar or admission as attorney to less than three.

5. The Benchers in convocation may by regulation require that clerks hereafter articled shall pass a preliminary examination; and the term of service under articles to entitle each articled clerk to be admitted an attorney shall date only from the passing of such examination.

6. The fees payable by barristers, as term fees, and on call to the bar, and by attorneys on admission as attorneys, and by students and articled clerks on admission as such, and on examinations and attendance on lectures and readings shall be paid into the general funds of the Law Society, and shall be such as the Law Society shall by rule from time to time prescribe.

7. The Benchers of the Law Society shall, during Hilary term in each year, furnish to each member of the Law Society entitled to vote at the election of Benchers, a statement in detail of the revenue and expenditure of such Law Society, for the year ending the thirty-first day of December preceding each statement, the same to be first duly audited by auditors appointed by said Benchers to audit and report upon the finances of the said Law Society.

8. [Repeal of Con. Stat. U. C. Cap. 36, and Con. Stat. U. cap. 35, sec. 26; sub-secs 2, 3, and of inconsistent enactments.]

9. The Benchers of the Law Society in convocation are authorized to make such compensation as they may in their discretion think fit to any reporter, unless such reporter is appointed a reporter under this Act.

10. This Act shall come into force on the first day of Easter term next.

An Act to amend the "Law Reform Act of 1868."

Her Majesty, &c., enacts at follows:

1. Immediately after the word "jury" in the last line but one of sub-section 1 of section 18 of the Law Reform Act of 1868, there shall be inserted the following words, that is to say: "And in any action of ejectment the claimant or defendant may require the issue to be tried, and the damages, if any, to be assessed by a jury; and in that event the defendant shall file with his appearance, and the claimant

shall annex to his issue book, and on the day of service of the same file in the office from which the writ of summons issued, a notice in the words following: The claimant or the defendant (as the case may be) requires that the issue in this cause be tried, and the damages (if any) be assessed by a jury."

2. And the said sub-section shall be construed as if the said words had originally formed a part of the same.

An Act to amend the law respecting the issue of the Prerogative Writ of Mandamus.

Whereas, &c.:

1. In all cases in which the Court has jurisdiction to issue the Writ of Peremptory Mandamus, it shall be the duty of the judge, provided he be of opinion that the case is a proper one for the issue of the same, either in term time or in vacation, to make an order for the issue of the said writ under this Act from the Court in the first instance, and without a writ *nisi*, and the said writ, when issued, shall have the same force and effect as if it had been issued by rule of the Court.

2. The application for the said writ shall be made upon affidavit to a judge, who shall have authority to issue a summons calling upon any person who may, in his judgment, be affected by the writ if issued, to show cause why the same should not be issued.

3. Such summons may be served upon the person or party named therein, either personally or by substitution, as may be directed by the judge, in the same manner as a writ of summons.

4. The application may be made upon hearing by the parties, either in person or by counsel.

5. Affidavits may be filed in answer to the application, and in reply, according to the present practice on chamber applications.

6. Every deponent whose affidavit is so filed shall be liable to cross-examination and re-examination upon the same, in presence of counsel for, or after notice to all parties, either before the judge or before any officer of the said Court to be named by the judge, and the evidence shall be reduced to writing, returned into Court, and used on the hearing of the application.

7. Upon hearing the parties who appear, or their counsel, and after service of the said summons upon all proper persons as hereinbefore provided, the judge shall, if in his opinion it is a proper case for the issue of the said writ, order the issue of the same, and shall by his order direct what is to be done and performed by the person or party to whom the writ is directed, and the writ shall conform to the order; but if in his opinion the application should be refused, the said summons shall be discharged.

8. The judge shall have the same power in vacation to enforce obedience to the said writ by attachment, to be issued from the Court, as the Court has in term time to enforce obedience to a writ issued from the Court upon a rule thereof.

9. The costs of every application under this Act, and incidental thereto, shall be in the discretion of the judge who shall dispose of the application, and he shall make such order as to the same as to him shall seem just; and a writ of *fieri facias* may be issued from the Court to compel payment of the said costs without making the judge's order a rule of Court.

10. [Judges to make rule.]

11. No part of the jurisdiction hereby conferred upon the judges shall be exercised by the Clerk of the Crown sitting in Chambers; and nothing in this Act contained shall prevent any person from applying to the Court for the said writ according to the present practice.

12. Any order made by a judge under this Act shall be subject to appeal to the Court; and the judgment of the Court upon such shall be subject to a further appeal to the Court of Error and Appeal.

13. The affidavits upon which the application is made shall be entitled either in the Queen's Bench or in the Common Pleas, and all subsequent proceedings shall be entitled in the Court in which the affidavits on which the application is made were entitled; and the word "Court" in this Act shall in each such mean either the Court of Queen's Bench or the Court of Common Pleas, as the case may be.

14. The word "judge" in this Act shall mean a judge of either of the Superior Courts of law.

An Act to amend the Act of the Province of Ontario respecting Superior and County Courts, passed in the thirty-fourth year of Her Majesty's reign, and chaptered twelve, and to declare the true meaning of section sixteen of the said Act.

Whereas, &c.:

1. Section 3 of the said Act is hereby amended by inserting immediately after the word "commenced" in the third line of the said section the following words, "or to one of the judges of the Superior Courts of Law sitting at Chambers."

2. Section 5 of the said Act, chaptered 12, is hereby amended by adding to the said section the words following, "or to any suit wherein the attorney for the defendant, or in the case of two or more defendants, where the attorney for any one or more of them resides in a county or union of counties different from that in which the attorney for the plaintiff, or, if he prosecutes in person, in which the plaintiff resides."

3. Notwithstanding the provisions and enactments in the said section 16 of the said Act, chaptered 12, contained, the 7th section of the Act passed in the 33rd year of Her

Majesty's reign intitutled, "An Act to make further provisions for carrying out the Act intituled 'The Law Reform Act of 1868,' and to regulate proceedings on writs of error and certiorari" and chaptered 7, is in full force and virtue.

An Act to amend an Act passed in the thirty-second year of the reign of Her Majesty, and chaptered twenty-two, respecting County Courts.

Whereas, &c:

1. That section 3 of the said recited Act is hereby repealed, and the following shall be section 3 of the said Act:

(3.) After the passing of this Act no Junior Judge shall be appointed in or for any county or union of counties in Ontario, except in any county or union of counties where the population shall exceed forty thousand, as shall appear by the official census then last taken.

2. The Junior Judge of the County Court of any county or union of counties is hereby authorized to transact such business in Chambers, in the absence therefrom of the Senior Judge, as relates to matters over which the said Courts have jurisdiction, and as may, according to the course and practice thereof, be transacted by the Judges of the said Courts.

3. It shall be lawful for any Judge of a County Court, if requested so to do, and when the interests of justice seem to require it, to sit for a Judge of another County Court either at the sittings or in term, or to hear any case triable under the special or summary jurisdiction of such Judge, and the County Judge while so sitting, shall have all the powers and authority of the Judge of the County Court within whose county or union of counties he shall be so sitting.

An Act further to amend the Law relating to Property and Trusts.

Whereas, &c.:

1. In the construction of the will of any person who may die after the 3 st March, 1872, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt, charged by way of mortgage on any part of his real estate.

2. In the construction of the said Act and of this Act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase money, or any charge, incumbrance or obligation of any nature whatever upon any lands or tenements of a testator or intestate.

3. Whereas by an error in the printed copy of the Act passed in the thirty-second year of Her Majesty Queen Victoria, intituled, "An Act to amend the law as to Wills," the word "not" is omitted in the beginning of the fourth line of the third section of the said Act, be it enacted that the said section be and the same is hereby amended so as to read as follows:

"3. Every will shall be revoked by the marriage of the testator except a will made in the exercise of a power of appointment, when the real or personal estate would not in default of such appointment pass to the testator's next of kin, under the Statute of Distribution."

And the said section so amended shall read as if incorporated in the said Act at the time of the passing of the same; but nothing in this Act shall apply to or affect any case now pending or heretofore adjudged by any court in this Province.

An Act to extend the rights of Property of Married Women.

Her Majesty, &c., enacts as follows:

1. After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a feme sole.

2. All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds and profits from any occupation or trade which she carries on separately from her husband or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings, moneys, or property shall hereafter be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a feme sole; and no order for protection shall hereafter become necessary in respect of any of such earnings or acquisitions, and the possession, whether actual or constructive, of the husband, of any personal property of any married woman, shall not render the same liable for his debts.

3. A married woman in her own name, or that of a trustee for her, may insure for her sole benefit, or for the use or benefit of her children, her own life, or with his consent, the life of her husband for any definite period, or for the term of her or his natural life; and the amount payable under said insurance,

shall be receivable for the sole and separate use of such married women or her children as the case may be, free from the claims of the representatives of her husband, or of any of his creditors.

4. A policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or upon which he may at any time after effecting such insurance, notwithstanding a year may have elapsed, endorse thereon that the same shall be for the benefit of his wife, or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed, and shall not so long as any object of the trust remains, be subject to the control of the husband or his creditors or form part of his estate, save and except for such amount as the same may be pledged to any person or persons prior to any endorsesation thereon for the benefit of his wife or children, or any of them, when the sum secured by the policy becomes payable: in the event of no executor or trustee having been appointed by the husband by will, a trustee thereof may be appointed by the Court of Chancery upon the application of the wife, or in the event of her death, by the children or their guardian, and the receipt of such executor or trustee shall be a good discharge to the office in which such insurance is effected; Provided always, if it shall be proved that the policy of insurance was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

5. Any married woman may become a stockholder or member of any bank, insurance company, or any other incorporated company or association, as fully and effectually as if she were a feme sole, and may vote by proxy or otherwise, and enjoy the like rights, as other stockholders or members.

6. A married woman may make deposits of money in her own name in any savings or other bank, and withdraw the same by her own check, and any receipt or acquittance of such depositor shall be a sufficient legal discharge to any such bank.

7. Nothing hereinbefore contained in reference to moneys deposited, or investments by any married woman, shall as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any money so deposited or invested may be followed as if this Act had not passed.

8. A husband shall not by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued therefor, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continned unmarried; and a husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts.

9. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this or any other Act declared to be her separate property, and shall have in her own name the same remedies both civil and criminal against all persons whomsoever, for the protection and security of such wages, earnings, money and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

10. This Act shall not affect any pending suit or proceeding.

11. This Act may be known as the "Married Women's Property Act, 1872."

An Act to empower all persons to appear on behalf of others in the Division Courts in the Province of Ontario.

Her Majesty, &c., enacts as follows:

1. Any person may appear at the trial or hearing of any cause, matter, or proceeding as agent and advocate for any party or parties to any such cause, matter or proceeding in the Division Courts in the Province of Ontario.

2. The Judge or other person lawfully holding any Division Court in the Province of Ontario may, whenever in his opinion justice would appear to require it, prevent any person from appearing at the trial or hearing of any cause, matter or proceeding in the said Court, as agent and advocate for any party or parties to any such cause, matter or proceeding.

We have kept the Division Court Act until the last, as it is such a tender morsel. It would scarcely be possible to find the anticipated abuse of an objectionable enactment more absurdly guarded against. Under what circumstances would "justice appear to require" a person to be "prevented" from appearing as an advocate or agent for another.

We have already published two other important Statutes: "An Act to make debts and choses in action assignable at law," and "An Act to declare the true construction of the Statute of 13th Elizabeth, chap. v., as to fraudulent deeds," &c. In addition to the

above measures we note that every person who carries on business under some name or designation other than his own, must register a declaration to that effect within six months after the passing of the Act.—That provision is made for the institution of suits against the Crown by petition of right and respecting procedure in Crown suits, &c.—An Act for the Prevention of Corrupt Practices at Municipal Elections.—That Committees of the Legislative Assembly may examine witnesses on oath.—That in the County of York the office of Clerk of the Peace and Crown Attorney may be held by different persons &c. There are no less than three Acts affecting Registrars, which, however, are not of immediate interest to the practising lawyer. We should have supposed it would have been more convenient, and a "better job" to have inserted all these provisions in one Act.

We shall probably have occasion to allude further to some of the Acts of this Session at a future time.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

Jordan v. Ambler.

Arbitration—Reference back—Costs.

[Prac. Court, Mich. Term, 1871.

Galt, J.—When a rule is asked for to refer a case back to an arbitrator to allow him to certify to prevent defendant deducting costs, the arbitrator evidently intending that each party should pay his own costs, the rule will be made absolute without costs. The costs of taking the award again before the arbitrator to be borne by the applicant.

Bain v. McKay.

Particulars of Fraud.

[Chambers, Oct. 27, 1871.]

Mr Dalton.—Particulars will be ordered of the fraud charged in a plea to a declaration alleging the breach of an agreement.

William McLean, *Primary Creditor*, Murdoch McLeod, *Primary Debtor*, and Daniel McLeod, *Garnishee*.

Division Courts — Garnishee proceedings — Discretion of Judge—Jurisdiction.

[Chambers, November 18, 1871.]

A garnishee in a Division Court suit not appearing on summons judgment was given against him. After a lapse of more than fourteen days he applied for leave to set aside this judgment and come in to defend. Meritorious grounds for relief being shown, the judge made an order as asked.

Hagarty, C. J., C.P.—The judge had jurisdiction to make such an order, although the fourteen days within which new trials should be asked for had elapsed.

A Judge of a Division Court has in garnishment proceedings large discretion to prevent injustice, nor is he to be tied down to rigid rules as to procedure and forms in cases where the subject matter of the suit and the suit itself is within his jurisdiction.

Cameron v. Milloy.

C. L. P. Act, sec. 227—Twenty days' notice of trial.

[Chambers, Dec. 22, 1871.]

Mr. Dalton—The provision as to twenty days' notice by the defendant to the plaintiff to bring on a case for trial does not apply when the case has once been tried.

Bain v. McKay

Pleading—Declaration in trover.

[Chambers, Dec. 27, 1871.]

Mr. Dalton.—It is incorrect in a declaration in trover to allege that the defendant converted to his own use *or* wrongfully deprived the plaintiff, &c. [Which is the form used in Bullen & Leake's Precedents.]

Harper v Smith.

Change of venue.

[Chambers, March 12, 1872.]

Mr Dalton.—When the place where the cause of action arose and the place of residence of the defendant and of his witnesses concur, a change of venue will be ordered to such County although the plaintiff's witnesses reside where the venue is laid.

ENGLISH REPORTS.

COURT OF EXCHEQUER.

Jones v. Brassey and Ballard.

Nolle prosequi—Entry of as to part of plaintiff's claim—Judgment by nil dicit as to residue—Second action for balance of claim—Plea of "judgment recovered"—Effect of nolle prosequi in support of such plea—No bar to second action.

In an action to recover £133 8s. 10d. balance due for work and labour, &c., in which the particulars of the plaintiff's claim consisted of a series of items about ninety in number, the defendants pleading first (except as to £65 7s. 3d. parcel, &c.), never indebted; secondly (except as to the said parcel), payment; and they said nothing in bar of the plaintiff's claim to the £65 7s. 3d. The plaintiff thereupon entered a *nolle prosequi* in respect of so much of his claim as the defendant's pleas were pleaded to, viz., £68 1s. 7d., and signed judgment by *nil dicit* for £65 7s. 3d., and costs of suit, which the defendants paid. Thereupon the plaintiff immediately brought a second action, in the same form, to recover the £68 1s. 7d., in respect of which the *nolle prosequi* was entered in the previous action, to which the defendants pleaded, first, never indebted; secondly, payment before action; and thirdly, a special plea setting up the judgment recovered for £65 7s 3d. in the previous action, in bar of and as an answer to the second action.

The particulars of claim in the second action were identically the same as those in the first action, with the addition of a credit item for "£65 7s. 3d., amount of judgment recovered," leaving a balance of £68 1s. 7d., for which the second action was brought.

At the trial, before Bramwell, B., a verdict was, by direction of the learned judge, entered for the plaintiff, and a rule having been obtained pursuant to leave to set that verdict aside and enter it for the defendants, on the ground that they were entitled to it on the plea of judgment recovered, it was

Held, by the Court of Exchequer (Kelly, C.B. and Channell and Pigott, BB.) discharging the rule, that the plaintiff was entitled to the verdict. The *nolle prosequi* entered as to part of the plaintiff's claim, before final judgment in the first action, did not preclude him from bringing a second action for the balance of his claim, which was the subject of the *nolle prosequi*, and from recovering; and the plea of "judgment recovered" was not supported or proved by the *nolle prosequi*.

[24 L. T. Rep. N. S. 947.]

The plaintiff had brought an action on the 27th October, 1870, against the defendants in the ordinary form to recover £133 8s. 10d., balance due for work and labour done and performed by him as a contractor and otherwise at their request, and for materials provided and money due on accounts stated, &c., in which the particulars of his claim delivered consisted of a series of items eighty or ninety in number, amounting in the aggregate to the sum of £278 5s. 10d; with a credit given for £144 17s., money received on account, showing a balance, which the plaintiff claimed to be due to him, of £133 8s. 10d., for which sum he brought the above-mentioned action. To the declaration in that action the defendants pleaded: first, except as to the sum of £65 7s. 8d., parcel, &c., never indebted; secondly, except as to the said parcel, satisfaction and discharge of the plaintiff's claim by payment; and they said nothing in bar of the plaintiff's claim to the said sum of £65 7s. 8d.

The plaintiff then, on the 14th Nov., 1870, entered a *nolle prosequi* in respect of so much of the claim, as the defendants' pleas were pleaded to—viz., £68 1s. 7d., and signed judgment for £65 7s. 8d. in the following form:—

"*Nolle prosequi* and judgment by *nil dicit*, dated 14th Nov., 1870.

"And hereupon the plaintiff says that he will not further prosecute his suit against the defendants, in respect of so much of the claim in the declaration mentioned as the defendants' pleas are pleaded to, and therefore, as to so much of the said claim, let the defendants be acquitted and go thereof without day, &c.; and, inasmuch as the defendants have said nothing in bar or preclusion of the action of the plaintiff in respect of the said sum of £65 7s. 8d., parcel of the money claimed, and in the said pleas excepted, the plaintiff remains therein undefended against the defendants, therefore it is considered that the plaintiff do recover against the defendants the said sum for £65 7s. 8d., and £7 7s. 6d. for his costs of suit."

The defendants satisfied the said judgment, and the plaintiff immediately thereupon, viz., on the 15th Nov., 1870, commenced the present action to recover the sum of £68 1s. 7d., in respect of which the *nolle prosequi* was entered in the previous action, as before mentioned, in which the declaration was in the same form as that in the previous action. To this declaration the defendants pleaded, first, never indebted; secondly, satisfaction and discharge by payment of the plaintiff's claim before action; and, thirdly, a special plea that the plaintiff, on the 26th Sept., 1870, in H. M.'s Court of Exchequer of Pleas at Westminster, impleaded the defendants, in an action for the recovery of the debts and moneys in the declaration above mentioned, and for, upon, and in respect of the contracts and causes of action in the said declaration above mentioned, and such proceedings were thereupon had in the said action that afterwards, and before the commencement of this suit, to wit on the 12th Nov., 1870, by the consideration and judgment of the said court, the plaintiff recovered, in the said action, the said debts and moneys in the said declaration above mentioned, to wit, £65 7s. 8d., and also £7 7s. 6d. for his costs and charges by him about his suit in that behalf expended, whereof the defendants were convicted; and by the record and proceedings thereof still remaining in the said court fully appears, which said judgment is in full force and unreversed.

By his replication, the plaintiff (1) suggested to the court the death of the above-named defendant Brassey; (2) joined issue on the defendants' first and second pleas; and (3) pleaded, by way of new assignment, to the third plea that he sued for money payable by the defendants to him for other causes of action than those in the said third plea mentioned, and in respect whereof the said judgment was recovered, as aforesaid.

To such new assignment to the third plea, the defendant Ballard pleaded, first, never indebted; secondly, satisfaction and discharge by payment before action; and upon those pleas to the plaintiff's new assignment issue was taken and joined.

The particulars of the plaintiff's claim in the present action, delivered under a master's order of the 5th Dec., 1870, consisted of precisely the same items and sums as those contained in the particulars delivered in the prior action, showing the before-mentioned balance of £133 8s. 10d., to which was now appended a credit item thus:

	£	s.	d.
	133	8	10
Cr. 1870. Nov. 14. By amount of judgment recovered.	65	7	8
	£68	1	7

and it was for that balance of £68 1s. 7d. that the present second action was brought.

At the trial of the present action before Bramwell, B, at Westminster in Hilary term last, the record and particulars in the former action were put in and admitted. It was also admitted that, before the pleadings in the first action, all the items and the defendants' objections to them were discussed, and also that the defendants intended to suffer judgment for all that was due in respect of each item. Thereupon a verdict was, by the direction of the learned judge, entered for the plaintiff for £68 1s. 7d., subject to a reference. Referee to be agreed on by the parties, or to be named by the judge, with leave reserved to the defendants to move for a rule, calling on the plaintiff to show cause why the verdict found for the plaintiff should not be set aside, and a verdict entered for the defendants pursuant to leave, on the ground that the defendants were entitled to the verdict, on the plea of judgment recovered, the learned judge having erroneously directed it to be entered for the plaintiff on that plea.

A rule to that effect was accordingly moved for and obtained on the 17th Jan. last by *Powell*, Q.C., on behalf of the defendant Ballard, against which rule,

Willis, for the plaintiff, now showed cause.—The question is whether, when a plaintiff has entered a *nolle prosequi*, as to part of a claim which he is seeking to recover by action, he can subsequently bring another action in respect of that part. Upon the pleadings here two courses were open to the plaintiff, to sign judgment for the £65 7s. 8d., but which, while the pleas were on the record undisposed of, would only be interlocutory; or, instead of joining issue on the two pleas, where the defendants say nothing as to the plaintiff's claim, the latter is entitled to enter a *nolle prosequi* on the pleas, and to sign final judgment. Unless that be so, a defendant, admitting a part to be due, might, by such pleadings, keep a plaintiff out of claim admittedly due. The pleas were pleaded on the 10th Nov.; the plaintiff did join issue, but entered a *nolle prosequi* as to the £68 1s. 7d., and judgment by *nil dicit* on the 14th Nov. as to the £65 7s. 8d. Whether or not the defendant got his costs of the pleas as to which the *nolle prosequi* was entered does not appear, but at all events by the 8 & 4 Will. 4 ch. 42, he was entitled to them. In Chitty's Archb. Pract., 12th edit., pp. 1214-15. it is said that, "Where a *nolle prosequi* is entered as to the whole declaration, the defendant is, and always was, entitled to costs in the same manner as upon a discontinuance. But where it was entered as to some of several counts, or part of a count, though the plaintiff was not entitled to costs as to those counts, or parts of counts, notwithstanding a verdict in his favour for the rest, yet he was not, before the 8 & 4 Will. 4, ch. 42, liable to pay the defendant his costs occasioned thereby; but by sec. 33 of that Act, it is enacted that 'where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.'" The Act was clearly passed for the very purpose of giving costs to a defendant where the plaintiff abandons his claim. The plaintiff signed judgment for £65 7s. 8d. only, and costs, which were paid, and then immediately afterwards he commenced this second action for the claim as to which the *nolle prosequi* was entered, to which the defendant pleaded, *inter alia*, a plea of judgment recovered, as to which the plaintiff new assigned that he sued for other causes than those for which judgment was recovered. [Channell, B.—It was stated just now that the question was, whether the effect of a *nolle prosequi* was the same as a plea of judgment recovered; but, on the pleadings, it would appear to be no such thing, but that there was here a new assignment. The replication to the plea of judgment recovered should have been *nul tiel record*. Kelly, C.B.—Why should not the plaintiff bring his second action for the balance?] Just so. In Bullen and Leake's Pleading, 3rd edit. p. 658, note (*b*), it is said, "It sometimes happens that a defendant who has no answer to the plaintiff's claim is not prepared to pay the amount of it into court, and that in order to avoid the costs of trying an issue fruitlessly, he suffers judgment by default as to this part, and pleads only to the residue. In such a case, if the plaintiff proceeds for the residue, no present advantage can be taken of the judgment by default, which will be interlocutory only; so that the defendant gains time and saves costs, and avoids providing any money. The plaintiff may sometimes find it advisable to defeat him in this, by entering a *nolle prosequi* to the part pleaded to (*for which he can afterwards bring an action*) and then take a final judgment at once for the residue." That is just what has been done by the plaintiff here

Powell, Q.C., and *J. O. Griffits*, for the defendant, *contra*, in support of their rule, submitted that the opinion expressed on this point in Bullen and Leake was wrong. The particulars delivered in the original action consisted of eighteen items of account, showing a balance due of £133 8s. 10d; then came the entry of *nolle prosequi* and judgment by *nil dicit* on the 14th Nov., and the plaintiff recovered £65 7s. 8d and his costs, and the defendant got no costs. Then, in the second action, the present one, to recover the balance of £68 1s. 7d., the particulars delivered are identically the same, word for word, and item for item, with those in the first action, superadding to them only a credit item for the £65 7s. 8d., the amount recovered under the judgment. The particulars in the two actions are identical, and there is nothing to show what items or particulars constitute this balance of £68 1s. 7d. [Pigott, B.—The particulars are the same, but the action is not for the same sum as that which was recovered in the first action.] Instead of entering a *nolle prosequi* the plaintiff's duty was to have gone on and met the defendant in his pleas, and so one action would have settled the whole matter: *Lord Bagot* v. *Williams*, 3 B. & C. 235. [Pigott, B., refers to the case *Cooper* v. *Tiffin*, 3 T. R. 511, cited in Tidd's Practice. Martin, B.—A nonsuit and a *nolle prosequi* are not in principle the same. On a trial a plaintiff must be present to hear the verdict, and if he is not, it cannot be given: that is a nonsuit. A *nolle prosequi* is an *abandonment* of the cause of action on the record.] It is contended that here judgment has been recovered for all the items claimed in the action. The question involved is one of fact. The pleadings are general—limited no doubt by the particulars Suppose the first action had been for two items only, say of £20 each, and the particulars showed two items only; then a plea and payment into court of £30; or judgment by default as to £30—it is immaterial which—and a *nolle prosequi* as to £10, and the plaintiff had adopted similar proceedings to these here? Surely he could not bring a second action for that £10? [Pigott, B.—I agree that if the first action had been for £20 for a gold watch and £20 for a silver one, and the defendant had paid in £30, which had been taken in satisfaction, the plaintiff could not have brought a second action, having recovered the value of the two watches. But it is matter of evidence, what was *involved* in the former action?] No doubt in some instances a *nolle prosequi* may have the effect of a nonsuit, but not in others, and certainly not in this case. On the authority of *Bagot* v. *Williams* (*ubi sup.*), we contend that

it was not competent to the plaintiff to bring the second action.

Kelly, C B.—I am clearly of opinion that this rule must be discharged. Whether we consider this case as a claim made by the plaintiff and denied on the part of the defendant, and without any pleadings at all, upon the facts stated as in a special case, or whether we consider the point as raised upon the pleadings which was reserved at the trial, whether a second action can be brought after a *nolle prosequi* has been entered, under the existing circumstances —in either case it is clear that by law, and in fact upon the merits, the plaintiff is entitled to the verdict The plaintiff brings his action for £133, which it must be taken was due to him, of that sum £65 has been paid, leaving £68 remaining unpaid, and due, and for that latter sum the verdict has been found, and to it, beyond all question, if there were no pleadings, the plaintiff is entitled. But, supposing we proceed, notwithstanding the admission of the parties, to consider the question whether a *nolle prosequi*, entered under the circumstances of this case, is a bar to that claim of £68, how stands the case? Divested of all the legal technicalities and expressions it amounts simply to this: The plaintiff brought an action and delivered particulars for £278, admitting the payment of a certain portion of that sum, and leaving a balance due of £133. I dismiss the fractional parts. He claimed, therefore, £133 for work and labour, and to that the defendant pleaded, admitting £65 to be due, and for that amount judgment was suffered by default, and the £65 was paid With regard to the residue, the defendant denied that he owed it; and, if the parties had proceeded to trial, the plaintiff, notwithstanding the pleas of never indebted, and payment, would no doubt have recovered the £68 also, the defendant being indebted in and never having paid that amount. But, instead of that, and it is immaterial from what cause, the plaintiff took the £65, for which the defendant suffered judgment by default, and taxed and obtained his costs; and with regard to the remaining £68 he entered a *nolle prosequi*. Upon that, the defendant (whether or not he availed himself of his legal rights I do not know), was undoubtedly entitled to tax his costs of the action, so far as regarded the portion of them relating to the £68, and to have judgment for, and to obtain payment of, such costs from the plaintiff. It is quite immaterial whether he did so or not, and if he has not done so it is his own fault. But, that action being thus at an end, there being judgment by default for £65, and a *nolle prosequi* as to the remaining £68, the plaintiff now brings a second action for £68. The question, and the only question, is, whether the *nolle prosequi* supports and proves the plea of judgment recovered? I think it does not. It is not a judgment recovered. There is, in one sense, a judgment recovered upon a *nolle prosequi*, entitling the defendant to his costs upon the plea, but it is not such a judgment as precludes the plaintiff, in point of law, from bringing another action for the £68. All the authorities are to that effect without any exception or qualification. The only exception existing to that rule of law is, where the *nolle prosequi* is entered *after final judgment* in the first action, and then it has no effect enabling the plaintiff to bring a second action Where a *nolle prosequi* is entered *before* final judgment in the first action, there is nothing to prevent a plaintiff from bringing a further action. Here he has brought his action for the balance of £68 and the *nolle prosequi* does not preclude him from recovering it. But if it did, it is not a judgment recovered so as to support this plea; and, upon this ground, the plaintiff is clearly entitled to the verdict, and the defendant's rule must therefore be discharged.

(To be continued.)

REVIEWS.

Index to Precedents in Conveyancing, and to Common and Commercial Forms; arranged in Alphabetical Order; with Sub-Divisions of an Analytical Nature. By Walter Arthur Coppinger, Esq., of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1872.

Mr. Coppinger is not unknown to the profession. Some time since, he introduced himself into the company of legal authors as the author of the law of copyright in works of literature and art. His introduction was a respectable one, and his present compilation adds to his reputation as a laborious, painstaking, and accurate worker.

On the title page of his new work we find copied Dr. Johnson's appropriate aphorism, "Knowledge is of two kinds, we know a subject ourselves or we know where we can find information upon it." It is with the latter kind of knowledge that lawyers are principally concerned. Although every man is supposed to know the law, no man can with truth be said to know all the law; and the lawyer is fortunate who knows at all times "*where* to find the law."

What we understand by the law is a huge collection of statutes and decided cases, year by year assuming more gigantic proportions. With its increase in dimensions the necessity increases for such works as the one now before us. The idea is by no means a novel one. We have before us at present "A General Index to the Precedents in Civil and Crimina Pleading, applicable to the present practice in every ancient and modern collection, including also the precedents in the Books of *Reports*, from the earliest period to Easter Term, 3 Geo. IV. By Charles Petersdorff, Esq., of the Inner Temple. London: S. Brooke, Paternoster Row, 1823." Old as it is, we have

found it of service even in these modern days. Mr. Coppinger's work appears to be framed on the same plan. What Mr. Petersdorff did in 1822, and did well, in civil and criminal pleading, Mr. Coppinger has done and done well, in 1872, in conveyancing, common and commercial forms. Both gentlemen endeavoured to combine the analytical with the alphabetical order of arrangement. Mr. Coppinger, of the two, has, we think, in this respect, been the more successful. It may be urged against Mr. Coppinger, as it was urged against Mr. Petersdorff, that the value of his compilation would have been enhanced by a diligent examination of the precedents referred to, and that the index should have been confined to those of acknowledged correctness. But "acknowledged correctness" is an indefinite term. That which one man may think correct another may think incorrect, and that which no man may think correct may yet be useful to a man of fair learning, good judgment, and ordinary caution.

In Mr. C ppinger's index reference is made to 10,000 precedents, and yet the whole work is only 570 pages. We cannot better declare in what manner the author has performed his work, and his reasons for so doing, than by the use of his words. "Not only precedents of a modern character have been indexed, but such precedents in the earlier collections as may with slight alteration be adapted to the exigencies of existing circumstances. It has not been deemed advisable to exclude forms framed under acts of parliament which may have since been rejected, nor those which are virtually the effect of causes no longer necessitating a peculiar form, if such form may prove possibly of assistance either as a precedent or connection with other matters, or as a guide in construing an assurance or instrument under the altered state of the law. * * * For similar reasons a precedent has not been rejected on account of its verboseness or unnecessary length. Many a precedent, in its entirety now obsolete, may prove useful and suggestive as a guide in the preparation of a deed more suited to the style and phraseology of modern times, and the learning and precision of our earlier draftsmen may be resuscitated, if for this purpose alone, with advantage."

An index such as this is more permanent in structure than ordinary law books, and its value is less injured by the lapse of time than ordinary text books. But its value will be less diminished if its possessor will take the trouble to have his volume interleaved, and note new precedents as they come forth from the "womb of time."

The mechanical execution of the work is in Messrs. Stevens & Haynes best style, which is saying a good deal. The perspicuity of an author, however, is sometimes blunted by the blunders of his printer; but here both author and printer appear to have worked in the same spirit, and that is to make the work a success. We hope they have done so, for their efforts deserve it.

The Canadian Monthly and National Review. Adam Stevenson & Co., Toronto. Nos. 1 and 2. (Price $3 00 per annum.)

So many attempts to establish a periodical in this country which should be a vehicle for the development of English literature in Canada have resulted in failure, that every fresh attempt is regarded with some misgiving. Inasmuch, however, as Confederation has opened a wider field, both as a market and a source of supply, and as every year increases that field and adds to its fertility, we may hope that the effort now made will be attended with happier results..

Typographically, the new magazine is a credit to this country, and especially to Toronto, where the business of publication seems to be largely established. Nor do the contents of the first two numbers belie the neat, plain, yet attractive exterior. Sufficiently solid, without being heavy, they are like a well baked home-made loaf, sustaining, yet easy of digestion. Variety prevails; but, thank the conductor, *no sensationalism*. May they ever avoid that rock on which so much of our periodical literature is wrecked, and rendered useless for everything but mischief!

To get at the best part of these numbers we must begin at the end, where the "Book Reviews" are to be found. The critique in the February number upon Mr. Freeman's historical essay is very interesting, and that upon Longfellow's "Divine Tragedy" is a gem, which even the warmest admirer of Mr. Longfellow cannot fail to appreciate, even if they are forced to the conclusion that for once he has made a mistake. *Query.*—Could not a nicer phrase than this be hit upon? Surely "Book Re-

views" is not such English as so great a master of the language as we fancy we discover working here would undertake to defend. It smacks too much of that modern style which regards adjectives and substantives as possessing a difference without a distinction.

The magazine is not to be made altogether non-political except in a party sense; and here the Editors are probably right, for otherwise the publication would be deprived of a subject without which its professed character of a national work would be practically negatived. Nevertheless, to treat of such subjects in a judicious way so as to hit the happy mean of instruction, without "raising the dander" of either Grits or Tories, will be no easy task. The article upon "The Recent Struggle in the Parliament of Ontario" is very good, and comes within the rule that no party politics are to be discussed. The paper upon the Census of 1871 is full of suggestions of great value. And, in connection with this article, we are reminded that we have received a pamphlet published by Mr. J. C. Taché, controverting some of the views advanced by Mr. Harvey, and, perhaps, in some instances successfully. Mr. Taché says, correctly enough, that "the rate of increase of one period, in a young country yet undergoing the process of colonization and traversed by migratory currents, is no criterion whatever of the rate of increase of the next period. The population of Upper Canada was 465,357 in 1841 (end of that year), as ascertained by the census of that year; it was 952,004 in 1851 (end of the year); and 1,396,091 in 1861 (end of 1860), showing a total increase of 104 per cent. for one decenniad, and 46,000 for the period next following. But as the second period was made, in reality, only of nine years, the correct statement is to say that the annual increase was at the rate of 7.42 during the first, and 4.84 during the second period. This example shows the fallacy of calculations based on a mere regular geometrical progression." Again, when speaking of the supposed inaccuracy of the census, he alludes to the special re-numeration of St. Marys, which gave the population of that place as 3,178, taking nine months after the taking of the census, which gave the number as 3,120. It is, however a matter of notoriety that general disatisfaction exists on the subject of the last census.

We are glad that military matters, so essentially a part and parcel of this Canada of ours, are not overlooked, and so far that department has been well supplied by the pen of Lt.-Col. Denison.

We understand that the proprietors are determined that the want of immediate financial success sahll not deter them from giving the enterprise a fair trial. That it will succeed we have no doubt, and that it includes among its contributors one so well known and so highly appreciated in the literary world as Mr. Goldwin Smith cannot but tend largely to that success.

The leading articles contained in the January number are, "The Washington Treaty," by Chas. Lindsey, Esq.; "Anne Hathaway—a Dialogue," by Dr. Wilson, of University College; "The Cavalry Charges at Sedan," by Lt.-Col. G. T. Denison, jun.; "Man's Place in Nature," by Prof. Nicholson, of University College; an article on the curiosities of Canadian Literature, by Dr. Anderson, of Quebec; the initial chapters of an admirably written story entitled "Marguerite Knecler, Artist and Woman," by Miss Murray, of Wolfe Island; a Sketch of an Historical Night in the Old Canadian Parliament, by S. T. Watson, Esq.; two original poems—"Marching Out," and "January;" and a translation by Goldwin Smith, M.A., of the Opening of the Second Book of Lucretius, together with Tennyson's recent poem, "The Last Tournament."

The contents of the February number are—"The Canadian Census of 1871," by Arthur Harvey, Esq., of Toronto; a thoughtful article on Early Christian Art and Symbolism, by the Rev. W. H. Withrow, M.A., of Niagara; "Modern Dress" by Mrs. C. R. Corson; "A North American Zollverein," by Chas. Lindsey, Esq.; a description of "A Night of Terror in the Backwoods," by Mrs. Muchall, (not quite equal in style and tone to the other matter), and a capital article on the Recent Struggle in the Ontario Legislature, by a "By-stander." Marguerite Knecler is continued in a style equal to its commencement, and the poetical contributions include "Marching In," "February," "The Bachelor's Wife," "One Woman's Valentine." The selections are excellent, embracing a biographical sketch of Henry Cavendish, a study of Hibernicisms in Philosophy, by the Duke of Argyle, and a critique upon Helps as an Essayist, by the Rev. Charles Kingsley.

DIARY FOR APRIL.

1. Mon.. *Easter Monday.* County Court Term begins. Clerks and Dep. Clerks of Crown and Master and Registrar in Chancery to make quarterly returns of fees.
6. Sat... County Court Term ends.
7. SUN.. *Low Sunday, or 1st after Easter.*
14. SUN.. *2nd Sunday after Easter.*
21. SUN.. *3rd Sunday after Easter.*
23. Tues. *St. George.*
25. Thur. *St. Mark.*
28. SUN.. *4th Sunday after Easter.*

THE

Canada Law Journal.

APRIL, 1872.

An interesting and novel question of constitutional law has been examined by the Irish Court of Queen's Bench, in an action against the Lord Lieutenant and others, for an assault. The alleged occasion was when a mob was dispersed by the Dublin Metropolitan Police at the time of the visit of the Prince of Wales to that city. A summary application was made to stay the suit, founded upon affidavits shewing that the only part His Excellency had in the matter was in his official character as head of the Executive Government of Ireland. The motion was granted, the full Court agreeing that the action, so far as applied to the Lord Lieutenant, was brought for an "*act of state,*" and that no such action could be maintained against him in the country where he exercised such authority.

The Lord Chancellor has held in *Sharp* v. *Baron de St. Sauveur*, that the last Imperial Act, 33 Vict., c. 14, empowering aliens to hold and dispose of real estate, has not a retrospective operation, so as to validate the title of land devised to an alien before the passing of this Statute. The *Law Journal* in commenting on the decision, points out that if the alien is living, the title might probably be perfected by a grant from the crown, upon petition to the Secretary of State. And it also gives the following hint to conveyancers, that where it is intended, either in the lifetime or after the death of the alien, to sell land with such a flaw in the title, the best course to adopt is to bind the purchaser by the conditions of sale not to raise the particular objection to the title, and thereby to cast upon him the burden of completing the title by application to the crown. It may be remarked that a condition of this kind was observed upon very unfavorably by the Master of the Rolls in *Else* v. *Else*, 20 W. R. 286.

A new point in connection with selling the good will of a business, has been decided by the Master of the Rolls to this effect: the vendor of a business as a going concern is at full liberty to set up a new business, and to publish advertisements addressed to the public in general, soliciting custom; but he is not at liberty in any manner to solicit his former customers to continue to deal with him, or not to continue to deal with the purchaser of the business. The case proceeds upon an application of the well-established rule, that he who sells a thing shall not afterwards impair the value of that which he has sold. *Labouchere* v. *Dawson*, 20 W. R. 309.

Owing to the short-sighted economy of the English Government, in keeping down the judicial force, whereby the Chief Judge in Bankruptcy has also to do duty as Vice-Chancellor, the unseemly spectacle was lately presented in Bankruptcy, of one Registrar sitting in appeal from another Registrar in regard to a matter relating to the duty of a Registrar on a given state of facts. It must be very pleasant for clients to see the assets of an estate gradually disappearing in procedure like this, where costs are incurred, but the cause not a whit advanced; for we do not suppose that the appellate decision of one Registrar will be any more satisfactory than the original decision of his fellow Registrar.

In bare contemplation of the possibility of a new trial in *Tichborne* v. *Lushington*, the *Law Journal* favours the passing of a law making the ruling of the judge at Nisi Prius absolutely final on all questions of the admission or rejection of evidence, just as it is now in England on stamp questions, with power to the judge to permit an appeal where the verdict in the cause would in substance turn on the evidence in question. The suggestion well merits consideration, when one observes how litigation has been prolonged by the unfortunate rejection or the inadvertent admission of some paltry scrap of evidence that

was really of inappreciable consequence one way or the other.

It has lately been held in the English Court of Admiralty, that under Lord Campbell's Act, corresponding to Con. Stat. Can., c. 78, sec. 2, it is competent for the Court or jury to award compensation in the case of an unborn infant whose father has been killed by accident. *The George & Richard* 20 W. R. 245.

A Mr. Bass has introduced a Bill into the British House of Commons to abolish the power to recover debts under 40*s*. Some of the best of the County Court Judges, however, have taken the would-be benefactor of the poorer classes to task, and say that the effect would be most disastrous to the persons whom it is desired to benefit—we think so too.

QUEEN'S COUNSEL.

The names of seven gentlemen have recently appeared as Queen's Counsel in the *Ontario Gazette*. They are all of unquestionable standing in the profession, and are entitled—some of them eminently so—to the position to which the Lieutenant-Governor has assumed to call them.

Two points, however, arise in connection herewith: firstly, has the Lieutenant-Governor any jurisdiction whatever in this matter, and does not the power rest solely, as heretofore, with the Governor-General? And secondly, have not names been omitted, which the profession would have expected to have seen on the list—we will not say instead of some of those gazetted, but, in addition to their number?

As to the first point, there are grave doubts whether the Lieutenant-Governor, who is appointed, not by the Crown, but by the Dominion authorities, has the power to make Queen's Council and such doubts have been expressed, even by political supporters of the present administration, and, it is also said, by some of the recipients of the honour. This part of the subject we must, however, reserve for future consideration.

As to the second point, it cannot be denied that there is a feeling of surprise on the part of the profession, that the claims of two or perhaps more Barristers to whom we shall refer have been overlooked. The selection has apparently been made with reference the respective claims of the Common Law and Chancery Bars. We have heard complaints that the Country Bar has not been sufficiently represented, but we do not hold to the doctrine that either the Common Law and Chancery Bar, or the Toronto and Country Bar must be equally represented, and in these respects we see no cause of complaint. But, undoubtedly, those whom the Crown ought to select as its counsel ought be those whom their brethren at the Bar would delight to honor. We admit the great difficulty, not to say impossibility of pleasing every one, and we say now, as we said before, that at least three of those (Dr. McMichael, Mr. Christopher Patterson, and Mr. Anderson) recently nominated, should have been appointed long ago on the nomination of the Ottawa Government. But upon what principle of selection Mr. Leith has now been overlooked we do not understand. He was called to the Bar in 1849, and is senior to all the others; and not only is he a man of good general attainments, but in his own important and abstruse speciality, he enjoys the confidence of his brethren in the highest degree. In addition to this Mr. Leith has done immense service to the profession in the treatises he has published on real property subjects, and that "for love and not for money." If a precedent were wanted we might refer to the analogous case of Mr. Joshua Williams, Q.C. We think also that Mr. James Maclennan and two or three we could name are entitled to this distinction equally with some of those who have been appointed, and Mr. Maclennan's name has been mentioned freely as one which should have been found along with those in the *Gazette*.

We thoroughly understand the difficulty of making a selection in these matters, and we desire to give to the learned and eloquent President of the Council, who has obtained such a high position so early in life, both at the bar and in public affairs, as well as to the Attorney General, full credit for an intention to make their selection without "fear, favor, or affection," and we hope that whosoever may prove to have the keeping of the fountain of honor in this Province will not fail to ascertain and carry out the wishes and expectations of so intelligent and independent a body as we believe the Bar of this Province to be, at least so long as they retain that enviable reputation.

COMMUNICATIONS BETWEEN CLIENT AND LEGAL ADVISER.

A correspondent writes us in the following terms:

"Sir,—I would like to have the question, as to the right of gentlemen of the legal profession to be held exempt from divulging in a court of justice their knowledge of their client's conduct in criminal matters, fully discussed in your journal. My proposition is that they are not exempt and that they ought not to be exempt."

The question proposed is not so accurately put as to enable us to determine precisely what is meant. But whatever is meant the discussion would be an unprofitable one, in this sense: that all that can be said upon such a matter has been said long ago, and the law thereupon is fixed beyond a peradventure. It is a well-established rule, that all communications passing between a client and his legal adviser (be he attorney, solicitor, or counsel) in the course, and for the purpose of professional business, are privileged. If the communication is made, not as between client and professional adviser, nor in the usual course of business, or for a fraudulent or illegal purpose, then it is not protected. It is difficult to condense the law on this subject into a few sentences, but it may be found written at large in any modern text-book on discovery or evidence. For example, Wigram, Kerr, Taylor, or Russell on Crimes.

We only discuss subjects taken up by the text-books, where those text-books seem to have come to erroneous or uncertain conclusions, or where there has been some recent alteration of the law, or where it is desirable to agitate for a change of the law, or for the purpose of making a *resumé* of cases upon some point not fully handled in such treatises. In the present instance, no fault can be found with the law; it is eminently reasonable. Suppose the rule were otherwise, then it would be impossible for lawyers to obtain information so as to enable them to give advice or conduct proceedings. No doubt something may be said as to the advisability of changing the law by statute, in so far as to declare privileged all confessions made to spiritual advisers. But it is certainly not desirable to change the present law by breaking down or modifying that privilege, as to legal advisers. It is in every respect, and in all aspects, fit and proper that confessions made by an alleged criminal to his attorney or counsel should not be divulged. If an attorney or counsel has acquired a knowledge of any criminal conduct, on the part of his client, from another source, then no privilege exists, nor need it exist, as to this. The maintenance and enforcement of the rule are supported by considerations which the Lord Justice Knight Bruce has expressed unanswerably: "Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much. And surely the meanness and the mischief of prying into a man's consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."—*Pearse* v. *Pearse*, 1 *De G. & Sm.* 28.

A well-authenticated anecdote is told respecting an ejectment suit, brought by a lady, a few years ago in England, who claimed some estates as sole heiress of the deceased proprietor. Before entering on proof of a long and intricate pedigree, which Mr. Adolphus her counsel had opened, Mr. Gurney, who was counsel for the defendant, offered to prove a fact which would end the suit at once, that the plaintiff had two brothers living, one of whom was then in court. Mr. Adolphus assented. The fact was proved, and on the plaintiff being asked whether she had communicated the fact to her attorney, she replied, "To be sure not; do you take me for a fool? why, he could not have undertaken the case if I had told him that." So difficult is it sometimes to get the truth and the whole truth from clients, under the most favourable circumstances. But remove the safeguard that the law has thrown around such communications, then awkward surprises and unpleasant discoveries worse than the above, would be the rule and not the exception. Then clients would be always speculating how far it would be safe to disclose their case; there would be half-confidences and imperfect narration of circumstances; suppressions and distortions of fact so that the advantages of advocacy would be well-nigh destroyed, and the relationship of solicitor and client, especially as to the "*alter ego*" theory,

would become a meaningless thing, of small benefit to either.

BEQUEST TO A CHARITABLE INSTITUTION.

For the first time since the Reformation the effect of a bequest and devise to a sisterhood of nuns, in England, has been determined by *V. C. Wickens*, in *Cocks* v. *Manners*. This Judge manifested how fitly he is characterized as the English lawyer who knows most about the law relating to charities, by delivering his judgment of unquestioned soundness at the close of the argument. One object of the testator's bounty was "the community of the Sisters of the Charity of St. Paul, at Selley Oak," who appeared to be a voluntary association for the purpose of teaching the ignorant and nursing the sick. As to these, it was held that they were a charitable institution, and that, consequently, the devise of lands failed, though the bequest of pure personalty was valid. There was also a devise to the Dominican Convent, at Carrisbrooke, which it was shewn was an institution consisting of Roman Catholic nuns, who had associated themselves together for the purpose of working out their own salvation, by religions exercises aud self-denial, not visiting the sick or relieving the poor, except casually or accidentally. The Vice-Chancellor was of opinion that such a society was not charitable, and not within the meaning of the act, so that the devise to them, of £6,000 value, was upheld. The curious issue of the law on this case is very strikingly brought out in the language of the *Law Journal*, as follows:—

"The one institution, on its own showing, does not visit the poor, or teach the young, or engage in any of the works of charity or mercy; and because it abstains from doing these good deeds, it is allowed to become the recipient of £6,000. The other institution has to be content with £100 because its members employ themselves in teaching the children of the poor and in nursing the sick. Mr. Bagshaw, in his argument, well compared the two institutions to 'Mary' and 'Martha' of Scripture history—the one 'active,' the other 'passive'—the one 'practical,' the other 'contemplative.' May we not carry the illustration further? As it was of old, so now, the 'passive and contemplative' convent of Dominican nuns seem to have chosen the good part, which the law will not take away from them."

"DULCE EST DESIPERE, &c."

It is strange how "good things" repeat themselves. These, also, would appear to fall under Solomon's aphorism about "nothing new under the sun." Mr. Justice Maule is credited with having had at his fingers' and tongue's end the whole cycle of professional *ana* that periodically re-appears in the published collections. It is told of him, that once upon a circuit his postchaise companion had picked up at a bookstall a collection of anecdotes, supposed to contain an unusual admixture of new material; but the learned Judge undertook to give the point of any story in it, on hearing two lines of it read, and really fulfilled his boast without a single failure.

But the particular "good thing" which has induced this moralizing occurred on this wise: In a case heard at the present Chancery sittings in Toronto, there was put in the witness box a gentleman of high standing in the community, though, like the worthy Zaccheus, little of stature. As he stood in the box, however, after being sworn, with arms stretched along the top, and shoulders and head just visible, he presented to the Chancellor's observant eye, as it first fell upon him, very much the appearance of some awkward fellow squeezed into a sitting position as comfortably as the straitness of the enclosure would allow; whereupon his Lordship admonished the witness to stand up and give his evidence properly. "But I *am* standing up, my lord," said the witness, with such solemnity as truth, spoken under oath, could alone give. An explanation of the true condition of affairs was then made *sotto voce* to the court, and the examination proceeded.

A counterpart to this is the story told of a diminutive barrister, *temp.* Lord Mansfield, named Morgan, who was so addicted to the citation of *Croke's* Reports that he won for himself the soubriquet of "Frog" Morgan,—to which probably his squat figure gave additional point. Before he was much known at the bar, he was beginning to open a case, when Lord Mansfield, in a tone of grave rebuke, addressed him: "Sir, it is usual for counsel, when they address the court, to stand up." "I *am* standing, my lord," screamed "The Frog;" "I have been standing these five minutes."

ACTS OF LAST SESSION.

An Act for the prevention of Corrupt Practices at Municipal Elections.

Her Majesty, &c., enacts as follows:

1. The following persons shall be guilty of bribery, and shall be punished accordingly:

(1.) Every person who shall directly or indirectly, by himself or by any other person lend, or shall offer or promise any money or on his behalf, give, lend, or agree to give or valuable consideration, or shall give or procure, or agree to give or procure or offer or promise, any office, place or employment, to or for any voter, or to or for any person no behalf of any voter, or to or for any person in order to induce any voter to vote or refrain from voting at a municipal election, or upon a by-law for raising any money or creating a debt upon a municipality or part of a municipality for any purpose whatever, or who shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any such election, or upon any such by-law.

(2.) Every person who shall directly or indirectly, by himself or by any other person in his behalf, make any gift, loan, offer, promise or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in any municipal council, or to procure the passing of any such by-law as aforesaid, or the vote of any voter at any municipal election, or for any such by-law:

(3.) Every person who shall by reason of any such gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure the return of any person in any municipal election, or to procure the passing of any such by-law as aforesaid, or the vote of any voter at any municipal election, or for any such by-law:

(4.) Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money, or any part thereof, shall be expended in bribery at any municipal election, or at any voting upon a by-law as aforesaid, or who shall knowingly pay, or cause to be paid, any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any such election or at the voting upon any such by-law:

(5) Every voter who shall, before or during any municipal election, or the voting of any such by-law, directly or indirectly, by himself or by any other person on his behalf, receive, agree or contract, for any money, gift, loan, or valuable consideration, office, place or employment, for himself or any other person, for voting or agreeing to vote, or refraining or agreeing to refrain from voting at any such election, or upon any such by-law:

(6.) Every person who shall, after any such election, or the voting upon any such by law, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted, or refrained from voting, or having induced any other person to vote or to refrain from voting at any such election, or upon any such by-law:

(7.) Every person who shall hire any horses, teams, carriages, or other vehicles for the purpose of conveying electors to and from the polls, and every person who shall receive pay for the use of any horses, teams, carriages or other vehicles, for the purpose of conveying electors to and from any polls as aforesaid.

2. Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of, or threaten to make use of any force, violence or restraint, or inflict, or threaten the infliction, by himself or by or through any other person, of any injury, damage or loss, or in any manner practise intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall in any way prevent or otherwise interfere with the free exercise of the franchise of any voter, shall be deemed to be guilty of undue influence, and be subject to the penalty hereinafter mentioned.

3. The actual personal expenses of any candidate, his expenses for actual professional services performed, and *bona fide* payments for the fair cost of printing and advertising, shall be held to be the expenses lawfully incurred, and the payment thereof shall not be a contravention of this Act.

4. Any candidate elected at any municipal election, who shall be found guilty by the judge, upon any trial upon a writ of *quo warranto*, of any act of bribery, or with using undue influence as aforesaid, shall forfeit his seat, and shall be rendered ineligible as a candidate at any municipal election for two years thereafter.

5. Where the writ of summons, in the nature of a *quo warranto*, is returnable before one of the Judges of the Superior Courts of Law, in case any question as to whether the candidate or any other voter has been guilty of any violation of sections one and two of this Act, affidavit evidence shall not be used to prove the offence, but it shall be proved by *viva voce* evidence taken before the Judge of any County Court, upon a reference to him by the Judge of the Superior Court, for that purpose, in the presence of counsel for, or after notice to, all parties interested; and in case such reference be directed to the Judge of the County Court, he shall return the evidence to the Clerk of the Crown at Toronto, and every party shall be entitled to a copy thereof.

6. In all other cases the Judge of the S.

perior Court before whom the writ of summons is returnable, may order the evidence to be used on the hearing of the summons, to be taken *viva voce* before the Judge of the County Court; and in any such case the previous section of this Act shall apply.

7. The vote of every person found guilty, upon any trial or enquiry as to the validity of the election or by-law of a violation of either of the first two sections of this Act, shall be void.

8. Any person who shall be adjudged guilty of any of the offences within the meaning of this Act, shall incur a penalty of twenty dollars, and shall be disqualified from voting at any municipal election or upon a by-law for the next succeeding two years.

9. The penalties imposed by this Act shall be recoverable, with full costs of suit, by any person who will sue for the same by action of debt in the Division Court having jurisdiction where the offence was committed; and any person against whom judgment shall be rendered, shall be ineligible, either as a candidate or municipal voter, until the amount which he has been condemned to pay shall be fully paid and satisfied.

10. It shall be the duty of the judge who finds any candidate guilty of a contravention of this Act, or who condemns any person to pay any sum in the Division Court for any offence within the meaning of this Act, to report the same forthwith to the clerk of the municipality wherein the offence has been committed.

11. The clerk of every municipality shall duly enter in a book, to be kept for that purpose, the names of all persons within his municipality who shall have been adjudged guilty of any offence within the meaning of this Act, and of which he shall have been notified by the judge who tried the case.

12. All proceedings against a candidate elected at any municipal election for any violation of the provisions of this Act, must be commenced within the time allowed by the Municipal Act of 1866.

13. Any by-law the passage of which has been procured through or by means of any violation of the provisions of this Act, shall be liable to be quashed upon any application to be made in conformity with the provisions of the Municipal Institutions Act of one thousand eight hundred and sixty-six, as hereinafter provided.

14. Before any application for the quashing of a by-law upon the ground that any of the provisions of this Act have been contravened in procuring the passing of the same, and if it is made to appear to a judge of one of the Superior Courts of Law, that probable grounds exist for a motion to quash said by-law, the said judge may make an order for an inquiry, to be held upon such notice to the parties affected, as the Judge may direct concerning the said grounds, before the judge of the county court of the municipality which passed said by-law, and require that upon such inquiry, all witnesses both against and in support of such by-law, be orally examined and cross-examined upon oath before said county court judge; and the said county court judge shall thereupon return the evidence so taken before him to the clerk of the Crown and Pleas at Toronto; and after the return of said evidence, and upon reading the same, any Judge of the said Superior Courts may, upon notice to such of the parties concerned, as he shall think proper, proceed to hear and determine the question; and if the grounds therefor shall appear to him to be satisfactorily established, it shall be competent to him to make an order for quashing said by-law, and may order the costs attending said proceedings to be paid by the parties or any of them, who shall have supported said by-law; and if it shall appear that the application to quash said by-law ought to be dismissed, the said Judge may so order, and in his discretion award costs, to be paid by the persons applying to quash said by-law.

15. After an order has been made by a judge directing an inquiry, and after a copy of such order has been left with the Clerk of the Corporation of which the by-law is in question, all further proceedings upon the by-law shall be stayed until after the disposal of the application in respect of which the enquiry has been directed, but if the matter be not prosecuted to the satisfaction of the Judge he may remove the stay of proceedings.

16. Any witness shall be bound to attend before the judge of the County Court upon being served with the order of such County Court Judge directing his attendance, and upon payment of the necessary fees for such attendance, in the same manner as if he had been directed by a writ of subpœna so to attend; and he may be punished for contempt, and shall be liable to all the penalties for such non-attendance in the same manner as if he had been served with such subpœna.

17. No person shall be excused from answering any question put to him in any action, suit or other proceeding in any court or before any judge, touching or concerning any election, or by-law, or the conduct of any person thereat, or in relation thereto, on the ground of any privilege, or on the ground that the answer to such question will tend to criminate such person; but no answer given by any person claiming to be excused on the ground of privilege, or on the ground that such answer will tend to criminate himself, shall be used in any criminal proceeding against such person, other than an indictment for perjury, if the judge shall give to the witness a certificate that he claimed the right to be excused on either of the grounds aforesaid, and made full and true answer, to the satisfaction of the judge.

18. All other proceedings against any person for any violation of this Act, shall be commenced within four weeks after the muni-

cipal election at which the offence is said to have been committed, or within four weeks after the day of voting upon any by-law as aforesaid.

19. [The clerks of municipalities to furnish returning officers with six copies of Act]

SELECTIONS.

AMERICAN SHIPS UNDER BRITISH COLOURS.

One of the items of damages claimed by the United States under the Alabama Convention consists of losses sustained by the transfer of American ships to the British registry. We believe that during the war more than seven hundred American merchantmen were transferred to our registry, and became British ships for the express purpose of escaping the Confederate cruisers. Assuming that this head of damage is within the treaty, and also capable of proof, we may suggest, on the part of Her Majesty, an objection to the claim which, in the majority of cases, will, we believe, prevail. If the British registry be inspected, it will be found that opposite to many of the ships are placed the names of American mortgagees. The names of the transferees are never given on the registry, but they could be easily ascertained. Now where the names of transferors and mortagees are identical, there arises the presumption that there was no absolute sale of the ship, but only a colourable transfer. So also if in other cases it be found that the transferred ships were held upon trust for the former owners, there again the claim would fail, because, there being no *bona fide* sale, there could be no loss. To these objections, founded upon general principles, must be added one of a more important character, based on the British Merchant Shipping Act 1854. By section 56 of that Act, every person, before being registered as transferee of a ship or share of a ship, must make a declaration that he is qualified to be registered as owner as owner of a British ship, and also that, to the best of his knowledge and belief, no unqualified person is entitled as owner to any legal or beneficial interest in the ship or any share therein. A false declaration constitutes a misdemeanour, and by section 103, if any unqualified person acquires as owner any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, such interest shall be forfeited to Her Majesty. Persons qualified to be owners of British ships are British-born subjects who have not sworn allegiance to a foreign State, denizens, and naturalised person. If, therefore, upon the evidence in any cases under this head of damage, it turns out that an American citizen has retained or acquired after transfer to the British registry any beneficial interest in the ship transferred, that share will be forfeited to the Queen, and no claim against the Crown for damage can be founded on a transaction which in itself constitutes a violation of the municipal laws of the United Kingdom.

It is impossible to believe that in four years ships showing an aggrégate burthen of half a million tons were bought out and out by subjects of the Crown, but the American claim rests entirely upon the hypothesis that such was the fact. The alternative hypothesis, which is much more probable, not only defeats the claim, but entitles the Crown to confiscate to its own use an enormous mass of property of the highest value.—*Law Journal.*

A FRENCH VIEW OF LORD BROUGHAM.

At the annual public meeting of the Académie des Sciences Morales et Politiques, a branch of the French Institute, held on Saturday last, M. Jules Simon read a report on the various essays sent in competition for the prizes offered by the Academy. The feature of the day, however, was an address delivered by M. Mignet upon the career and character of the late Lord Brougham, which occupied the attention of the assemblage for more than an hour an a half, and was listened to throughout with the closest attention. M. Mignet said:—"Lord Brougham was the oldest as he was the most illustrious foreign associate of the Academy. He was Lord High Chancellor of England when, in 1832, the Académie des Sciences Morales et Politiques was re-established, and he was immediately admitted to its ranks, and with indisputable titles. A celebrated and an intellectual writer, he had since the beginning of the century applied his powerful faculties and his varied talents to the propagation or defence of the noblest and most humane ideas. He had cultivated with an aptitude that was in some degree universal the vast field of social science, after having in his earlier day traversed not without distinction, the field of physical and mathematical sciences.

A great advocate, he pleaded the greatest causes with earnest speech and vigorous dialectics, and he acquired by his eloquence an imperishable renown. A political orator of extraordinary fertility, and not less remarkable for the loftiness of his views as for the brilliancy of his talents, he was placed from 1810 to 1830 at the head of that party in the House of Commons which desired to improve the laws and to extend the public liberties. An enterprising Minister and a reforming Chancellor, he effected in the Government and in the administration of justice those happy changes, equally prudent and just, which he had recommended while in Opposition." The talents and tastes of Lord Brougham were displayed at an early age, and M. Mignet dwelt at some length upon this portion of Brougham's career, recounting many anecdotes which have become familiar to the English public. After alluding to Brougham's advocacy on behalf of Queen Caroline, and to the famous speech demanding

A French View of Lord Brougham.

the repeal of the well-known Order in Council forbidding neutral vessels from entering French ports, the orator passed to the period when the subject of his address became Lord Chancellor, having in the meantime, during a space of twenty years, displayed inexhaustible activity and eloquence on behalf of the most liberal and generous views of reform. The new Chancellor was described as being—"Not only a Liberal Minister in the Council, a fruitful legislator in Parliament, but also a great magistrate in the High Court of Equity, where he was the supreme judge. No one possessed in a greater degree the sentiment and the perception of justice. Scarcely had he become installed in the chief seat of the Court of Chancery than he applied himself with honourable promptitude and ardent equity to accelerate the suits which had accumulated from time immemorial' and which formed a congealed mass of litigation. He sat with indefatigable assiduity in his Court, where he was many times found at the dawn of day listening to argument or delivering judgments. His penetrating sagacity and his general knowledge of jurisprudence enabled him to const tute a real Court of Equity. He there at the same time abolished abuses which would have been lucrative to himself, and he suppressed sinecures which were onerous to the State." Brougham's career in the House of Commons and his efforts on behalf of the parliamentary reform were dwelt upon by M. Mignet, who, referring to the celebrated speech in which the orator implored upon his knees the House not again to reject a bill so anxiously desired by all lovers of the country, said, "Certainly the kneeling was out of place." Referring to that later period when Brougham had become somewhat estranged from the leaders of the Whig party, he said, "At this time Lord Brougham was no less admired than he was fortunate, but perhaps he did give way a little to the intoxication of pride, and failed to restrain the intemperance of a mind whose fiery nature was capable of leading to any extravagance."

Passing to a consideration of Brougham's labours—political, philosophical, and historical—M. Mignet said, 'He loved the English Constitution as an Englishman, he admired it as a publicist. He has ably traced its history, explained its structure, appreciated its influence, and pointed out its useful developments.

Always in progress, the Constitution, becoming more and more representative of England and bending to the exigencies, had adapted itself to the diverse conditions of a great country, whose ideas it follows, and whose wants it satisfies. Little by little it has thus directed the efforts of all powers and classes within the State to the same end—the growing establishment of all that is right, the increasing respect for public interests, the skilful management of common affairs. Lord Brougham well explained that progressive Constitution which, without changing the form of Government, has perfected its means of action, has rendered royalty limited in its intervention, the aristocracy liberal in its conduct, and the democracy moderate in its pretensions; and which, constructed not by force of logic, but by history, has issued less from the spirit than from the very existence of a people which it has enabled in our days to conduct itself as a republic under a monarchy, to enjoy order, prosperity, and greatness combined with liberty. Lord Brougham dedicated his book upon the Constitution of England to Queen Victoria, under whose long reign that Constitution, faithfully observed in its spirit, has never been evaded in its exercise. Written at the age of eighty-one, that dedication is a model of propriety and grace. In the same year in which he dedicated a political work to the Queen of England he dedicated a scientific work to the University of Edinburgh, which selected him for its Chancellor in 1860. That volume contained treatises upon mathematics and physics, written between 1796 and 1858, upon the most various subjects—general theorems of geometry, problems of Keppler, dynamic principles, the differential calculus, the architecture of the cells of bees, analytical and experimental researches into light, the attractions of forces, and lastly, the admirable speeeh which he delivered at Grantham upon the occasion of inauguruating the monument to Sir Isaac Newton." After describing the residence at Cannes and the industrious and learned life which Brougham passed there during many winters, and where he died on May 7, 1868, M. Mignet thus summed up his estimate of his character:—"Henry, Lord Brougham, belongs to the number of the great men of his time and of his country. Endowed with extraordinary genius, possessed of vast knowledge, gifted with brilliant talents, animated by incomparable ardour, he devoted the thoughts of his mind, the enthusiasm of his soul, the resources of his knowledge, the brilliancy of his talents, to the service of the noblest causes—to the progress of justice, of law, of intelligence, of humanity.

A Reformer without a chimera, a Conservative without a prejudice, he never separated, either in his writings or in his actions, what was expedient from what was right, and it was his pride to keep in accord the free advancement of men and the moral order of society.

He was also the defender of political liberty, the persuasive advocate of civil equity, the zealous promoter of public education, the eloquent supportor of human emancipation. Illustrious by his works, memorable by his services, Lord Brougham must be counted among those great men who honour the country whose glory they sustain, who maintain what is right and strengthen what is good, and who, by the brilliancy of their talents and the generosity of their souls, are held by posterity in everlasting esteem.'—*Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

In re Brown and Wallace.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

32 Vic. cap. 32, secs. 23, 36, (Ont.)—Tavern License Act—Trial by Judge without jury—Depositions as evidence—Prohibition.

Held, 1. After an appeal to the Sessions from a conviction of a magistrate for selling liquor after 7 o'clock on Saturday evening, under 32 Vic. cap. 32, sec. 23, is confirmed a prohibition to the Sessions will not be granted.

Held, 2. That under the above section, it is irregular for the judge who tries the case to call a jury, or to receive depositions of witnesses as evidence, but this is not ground for a prohibition.

[Chambers, January 5, 1872—Galt, J.]

Osler obtained a summons, calling upon John Wallace, and George Duggan, Esq., the Chairman of the General Sessions of the Peace for the County of York, to shew cause why a writ of prohibition should not be ordered to issue out of this court to prohibit the said Court of General Sessions of the Peace from further proceeding in the matter of an appeal to the said court, wherein one Thomas Brown was appellant and one John Wallace was respondent, being an appeal from a certain conviction made by Alexander Macnabb, Esquire, Police Magistrate of the said City of Toronto, against the said Thomas Brown, on the twenty-third day of November, 1871, for that he the said Thomas Brown on November 11th, 1871, sold intoxicating liquors after seven o'clock in the evening of that day, and which said appeal came on to be tried at the said Sessions on December 16th, 1871, and was dismissed, and the said conviction affirmed with costs—on the grounds:

1st. That the said appeal was tried by a jury who were called and sworn upon the matter of the said appeal, and not by the said Chairman of the said Sessions, as required by the Statute in that behalf;

2nd. That the respondent gave no evidence in support of the said conviction, and that the learned Chairman of the said Sessions allowed the respondent to read to the said jury the depositions of the witnesses for the prosecution taken in the Police Court on the hearing of the information, instead of giving the *viva voce* testimony of the said witnesses themselves.

3rd. That the said conviction was affirmed without evidence, and the said Sessions exceeded their jurisdiction in so doing.

The facts of the case material to the application are the following:

The applicant Brown had been convicted in the Police Court of the City of Toronto, upon the evidence of two witnesses, and fined in the sum of $20 and costs, for selling liquor after 7 o'clock on Saturday evening contrary to sec. 23, cap. 32, 32 Vic., Ont. He appealed from this conviction to the Court of General Sessions, pursuant to C. S. U. C. cap. 114, and 32 Vic. cap. 32, Ont., sec. 36, which provides that such appeal "shall be tried by the Chairman of the Court without a jury."

The appeal came on to be heard at the Sessions, when the Chairman, with the consent of the appellant, but against the wish of the respondent, who contended that under the statute the appeal should be tried by him alone, directed a jury to be sworn to try the appeal. The respondent opened his case, and then offered evidence to shew that the witnesses upon whose evidence in the Police Court the appellant was convicted had left the Province, and he proposed to read their depositions taken in the Police Court as evidence in the trial of the appeal. The appellant objected that the depositions in question were not evidence, that the absence of the witnesses from the country did not entitle the prosecutor to read them, and that the witnesses themselves should be called. The learned Chairman of the Sessions overruled the objections, and the absence of the witnesses being proved, their depositions were admitted, and the conviction was affirmed with costs.

The summons for prohibition was then taken out.

Hurd, on behalf of the Chairman of the Sessions and of the respondent, shewed cause.

Prohibition is not the proper remedy, and justice has been done. The effect of a prohibition would be unfair, and put respondent in a worse position than before the appeal. If the appellant has any remedy it would be by error.

The effect of a prohibition if allowed would be the same as a *certiorari*, the right to which is taken away: 33 Vic. cap. 27, sec. 2 (Can.)

The appellant cannot take the objection that the case was tried by a jury, as the jury was called at his instance, and if he can, it may be said that the case was tried by the judge if he accepts their finding and makes it his own judgment. But we say that 32 Vic. cap. 32, sec. 36 (Ont.) is overridden by 32–33 Vic. cap. 31 (Can.) as amended by 33 Vic cap 27 (Can.), which govern in the matter of this appeal.

Osler supported the summons.

The Sessions have exceeded their jurisdiction in trying the case before a jury. The statute is express and positive in its terms, "*shall* be tried by the Chairman without a jury;" sec. 36. cap. 32, 32 Vic., Ont., and the appellant is not estopped from objecting to the jurisdiction by having consented to the jury being sworn: *Smith* v. *Rooney*, 12 U. C. Q. B. 66; *Yates* v *Palmer*, 6 D. & L. 283; 1 T. R. 552; 2 Just. 602, 607.*

Prohibition lies from the Queen's Bench to the Sessions: *Reg.* v. *Herford*, 3 E. & E. 115.

If inferior court assume a greater or other jurisdiction than that allowed by law, or refuse to allow an act of Parliament, Superior Courts will control them by prohibition: Bac. Abr.; Title Prohibition, C. p. 568; *Ib.* prohibition, K p. 567.

The court here has assumed a jurisdiction other than that allowed by law in another respect, in that it has decided the appeal without evidence, the depositions not being legal evidence and not receivable: Roscoe Cr. Ev., Ed. 6, pp. 65, 71; Dickenson's Qu. Sess.,

* See *Mossop* v. *Great Northern R. W. Co.*, 26 L. T. 92, and cases there cited.—Eds. L. J.

pp, 525, 643, 644; *Reg.* v. *Austin*, 25 L. J., M. C. 48; Indictable Offences Act, 32-33 Vic. cap. 30, sec. 30, Can., applies only to depositions taken on a preliminary investigation in a criminal matter. The appeal here was an entirely new proceeding, and the prosecutor had to begin *de novo*: Dickenson, 643, 644.

The appeal was governed by the Statute of Ontario, not by the Summary Conviction Act of Canada, 32, 33 Vic. cap. 31, for the subject of it was not a crime under sec. 1, and it was in relation to a matter wholly within the jurisdiction of the Provincial Legislature: B. N. A. Act, sec. 92, sub-sec. 9.

Galt, J. (having consulted Hagarty, C J., C. P.)—There is no doubt that the whole of the proceedings of the Sessions were entirely irregular; but I see a difficulty in granting a prohibition. How is the appeal to be disposed of? If we could grant a conditional prohibition until the next Sessions we might relieve the appellant, but it cannot be disputed that there was jurisdiction to *entertain the appeal*. Are then the facts, that a jury was sworn to try the appeal, and that improper evidence was received, reason for granting a writ of prohibition? I think not. The judge might accept the verdict of the jury, and make it the judgment of the court. I do not think that the other ground taken by the summons, that the Sessions proceeded without evidence, can be put higher than the admission of improper evidence, and this is no ground for a prohibition.

The summons must be discharged, but under the circumstances without costs.

Summons discharged without costs.

Nordheimer v. Shaw.

34 Vic., Cap. 12, Sec. 12.—Computation of time.

[Chambers, Jan. 4, 1872. *Mr. Dalton—Galt, J.*]

Ejectment. The defendant appeared to the writ, and defended for all the land claimed, on the 27th December, in the name of a Toronto attorney, and the next day the served issue book and notice of trial, &c. On the evening of the 29th December, the defendant served on the plaintiff's attorney an order substituting a country attorney in lieu of the former attorney, and with it a notice limiting his defence to part of the land claimed. The question then arose as to the meaning of the words "two clear additional days to the time now allowed by law for such service shall be added," given in the 34 Vic., cap. 12, sec. 12, when the attorney for whom papers are served on an agent resides in the country.

Mr. Dalton.—Service of notice of trial on Monday for Monday is good, and this makes six clear days. Service on Saturday for Monday week following would be eight clear days, thus making two clear days additional, and it is this which the statute means. The two days are to be added to the number of days required, between the day of service and the day for performance of the Act.

The plaintiff appealed from the above judgment, but it was upheld by Mr. Justice Galt.

CHANCERY CHAMBERS.

Meyers v. Meyers.
Harris v. Meyers.
Turley v. Meyers.

(Reported for the Canada Law Journal by T. Langton, M.A. *Student-at-Law.)*

Sequestration—Abatement of Suit—Effect of upon Sequestration—Form of application to set aside writ of Sequestration on ground of priority of applicant—Practice—Rights of lessees under Sequestration.

After decree for payment of money, the Plaintiff issued a writ of sequestration, under which the Sheriff, as Sequestrator, took possession of certain lands of Defendant. Defendant afterwards died, as it was supposed, intestate and the Plaintiff revived the suit against his heir. Subsequently, a will was discovered whereby defendant devised his estate to one Cross. Upon motion to set aside the writ of Sequestration for irregularity on the ground that the suit was not properly revived. *Held*, not an irregularity, but if revivor improper, time would be given to revive properly.

The application to set aside the writ was also based on the ground that the claims of the applicants and others as creditors of the defendant were prior to that of the plaintiff. *Held*, that even if such priority had been established the application to set aside the writ could not be made in Chambers, but that parties claiming priority must proceed under Order 398.

The Sequestrator had, under the authority of the Court, leased portions of the sequestered lands under leases which stipulated that in the event of the Writ of Sequestration being discharged by payment of the amount due or otherwise during the term created, the lessees should be entitled to six months' notice before giving up possession. *Held*, that even if writ irregular, the tenants were entitled to the notice.

[Chambers, ——— 1872. *Mr. Taylor.*]

The facts appearing on this application were shortly the following: Harris filed a bill against E. W. Meyers for redemption, and, on an account being taken, E. W. Meyers appeared to have received a large amount from rents and profits over and above his mortgage debt this E. W. Meyers was directed to pay, and a writ of Sequestration was issued to enforce the decree. E. W. Meyers died, as it was supposed, intestate, and the suit was revived against his heirs. Harris then assigned his interest under the decree to Turley, which occasioned a second revivor of suit as *Turley* v. *Meyers*. E. W. Meyers had, however, left a will by which he devised all his estate to one Cross upon certain trusts. Two questions were then raised: 1st It being doubted that Turley was the *absolute* assignee of Harris, whether he ought not to revive, making the Harris estate a party, and 2nd, whether the suit was not improperly revived against the heirs of E. W. Meyers, and ought not to be again revived against his executors. Subsequently the beneficiaries under the will commenced a suit against Cross and one Meyers for administration of the estate of E. W. Meyers in which a decree for administration was made, and the suit was consolidated with *Turley* v. *Meyers*. Turley proved his claim against the estate of E. W. Meyers in the Master's office, but the priorities of the several creditors had not been settled by the Master, but it was claimed by the applicants that there were creditors whose claims were prior to the sequestration.

Bain moved to set aside the writs of sequestration issued in *Harris* v. *Meyers* on the following grounds:

1. That *Harris* v. *Meyers* had never been properly revived against the proper parties.

2. That the judgment of Harris was subsequent to the claims of other creditors who had writs of execution against the testator, or had Decrees for payment out of the lands sequestered.

3. That Turley claims a judgment and has brought his claim into the suit of *Meyers* v. *Meyers* for the purpose of proving his claim therein.

4. By a Decree of this Court in *Meyers* v. *Meyers* it was ordered that the lands in the said suit be sold and those sequestered are included.

5. That the writs are void against other creditors who are prior to Turley.

6. That the creditors are entitled to have the lands sold free from the writs of sequestration.

He contended that the leases were made in the absence of the creditors and settled on the understanding that they could not be held against the creditors. That the tenants could have no right against the creditors, and that if the applicants were entitled to have the writs set aside the most the tenants could claim would be compensation. That as to the first ground of setting aside the writs, viz: that the suit had never been properly revived, the plaintiff, Turley, had to show that it was properly revived, and against the proper parties, in order to in any way affect the parties entitled to the estate, and anything done under the writ since the presumed Revivor could be of no avail. That Turley claimed to be the *absolute* owner of Harris' interest in the suit, whereas he was only mortgagee, and the representative of Harris ought to be before the Court as plaintiff or defendant. That interest should have been represented, he urged, before the suit could have been properly revived. The fact of the will never having been discovered would doubtless be relied upon by the respondents; this might be a good reason for an order never having been made but was no answer against an improper revivor of the suit. The order had been made in the absence of parties who ought to have been made parties and have received notice.

That as to the second ground the decree in *Meyers* v. *Meyers* was for the benefit of all creditors, and a sale of the property would cut out the sequestration, and the purchaser might come to this Court and seek to have it delivered up to him, but that the creditors were entitled to have the property sold in the best way possible, and to do this the writs of sequestration should be set aside before sale. It would no doubt be argued that there was not sufficient evidence before the Court on this application, of the claim of other creditors or their priorities, as they did not appear to be represented, but he submitted that the applicants under their decree for sale in *Meyers* v. *Meyers* as vendor's solicitors sufficiently represented and were entitled to shew the position of the creditors. And that the Court would restrain a judgment creditor who had proved his claim from proceeding to sell the property under his *fi. fa*, and for the same reason the Court would not allow a sequestrator to remain in possession after his claim has been proved in the Master's office.

C. Moss, for Loughead and Anderson, tenants of portions of the sequestered lands lands under leases granted by Sequestrator and approved by the Court, contended that the regularity or irregularity of the proceedings under the writ did not affect the lessees, but even assuming that the suit had never been properly revived, that was no reason for setting aside the writ of sequestration *in toto*. If while the writ was in force the suit became abated, the Court would give the parties time to revive it properly, and if they neglected to do so, the other parties must serve them with a notice to revive within a limited time. He quoted the expressions of Lord Hardwicke in the case of *White* v. *Hayward*, 2 Ves. Sr. 464, to the effect that the Court "*will not turn sequestrators out of possession but give time to revive the sequestration within reasonable time.*"

As to the second ground for setting the writ aside viz: that there are claims prior to those of the sequestrators, proof had not been given that there were any creditors in the Master's office prior to Turley; but even supposing there were, they must come in to shew this, and the applicant here could not set up the rights of those other creditors. The application on the ground of prior claims he submitted was improperly made in chambers. The former practice was for the parties claiming priority to apply for an order to be examined *pro interesse suo*. This was the mode of procedure till 1853, and it still remains the practice in England. In this country the person so claiming must now apply to the Court, under General Order 398, and cannot come into Chambers, and it must be a party who might have come in *pro interesse suo* who can now make such a motion. At any rate the lessees should not be injuriously affected by any thing done by the plaintiff Turley. These leases were made under the sequestration and by the authority of the Court, and leases so made were not to be set aside by the action of the plaintiff. These tenants have been acting in good faith, making improvements and expending money upon their farms. Each of them has paid sums to the Sheriff in advance, and in the terms of their leases is a clause which provides that if the sequestration should be discharged before the end of the term they should receive six months' notice from the parties entitled to the land before giving up possession. The Court provided specially for these lessees, and the six months' notice must be given to them before giving up their rights. They are not connected with the proceedings for revivor. They are in the position of purchasers *pro tanto*, and are not to be affected by any irregular proceeding, if it appears to be one that the Court could properly take, *Gunn* v. *Doble* 15 Gr. 655; *Collins* v. *Denison* 2 Cham R. 465. They are entitled to all the privileges which the Court throws around purchasers.

Hodgins, for Sequestrators, argued that the parties now moving had recognized that the suit had been revived, and could not therefore now dispute it; they could not recognize or deny it as it suited their purpose They were moving now a third time for what had been already refused them twice before. This application was simply an endeavour to reverse the order made in November last. That order directed the Master to settle the priorities of all creditors, and declared that all parties were to be at liberty to

dispute *before the Master* the claims brought in. The applicant sought to reverse that order and settle the priorities in Chambers. He stood upon the following points: 1st. The question of priority had been referred to the Master. 2nd. The infants on whose behalf the application is claimed to be made had nothing to do with regard to the priority. 3rd. No proof was brought of any creditor prior to and *primâ facie* the sequestrators were prior for there is evidence of their claim. The applicants have admitted that. But not only have the sequestrators a claim against the estate they had a judgment against the intestate in his lifetime. He did not die for four years after the writ of sequestration was in the hands of the Sheriff. *Meyers* v. *Meyers* in some form he found in every volume of the Chamber Reports, and referred to them to shew the position of the suit. (1 Cham. Repts. 229 and 262; 2 Cham. Repts. 121 and 240; 3 Cham. Repts. 103 and 107) He also referred to Pemberton on Revivor, 153, and the cases there cited. also to the suit of *Wharam* v. *Broughton*, 1 Ves. Sr. 183, where during four years the suit remained unrevived, and the Court gave time to revive it also to Dan. Pr. 952. And lastly he remarked that they were now unable to revive for the order in *Turley* v. *Meyers* stayed allpr oceedings in that suit.

Bain in reply said that all admit that the suit under the order of Revivor was not properly revived, and the question was whether they should now be allowed to revive. If it was shewn that it had not been properly revived, the order asked should be made and the Court would not allow a revivor in this case. Till the Harris estate was represented in *Turley* v. *Meyers* the proceedings were improper. The parties substantially interested were not before the Court, and besides the suit should be revived against the executors of E. W. Meyers, who represent not the heirs-at-law, nor the devisees, but the creditors. It was objected that this application had been made before, but he submitted that if defeated in one he could make a new application on grounds not in existence at the time of the first, and he contended that the two applications were different, one to set aside the writ and the other to set aside the revivor and the writ. If the Revivor and the Sequestration were got rid of they could get rid of the leases. Of course he had been obliged to acknowledge that an order of Revivor had been made, and what he contended was that it was improperly made. He did not seek to remove the discussion from the Master's office, he sought to remove the sequestration. All he now sought to determine was whether the writs were to continue in force after the parties had come into the Master's office and proved their claims. He had shewn that the estate would not pay fifty cents in the dollar, and by the Property and Trusts Act of 1865 when an estate is insolvent all creditors rank *pari passu* and Turley is in no better position than a judgment creditor who is not now preferred. Besides the decree in *Meyers* v. *Meyers* appointed a Receiver to receive the rents and profits until sale, and the Court would not in the same suit make two such contradictory orders, one directing a sale and appointing a Receiver until sale, and the other directing a Revivor of the Sequestration. It is not necessary to go to the Court unless to go into the merits of the case, but in a question of mere irregularity the application is properly made in Chambers and the practice which has been adopted instead of the old method of applying to be examined *pro interesse suo* does not apply to this application. That the tenants must be allowed their crops in the ground or be paid their value he conceded, but not that they are entitled to compensation for not having the full time of their leases, that must be paid them by the Sequestrator, for no matter what hardship it be to the lessees their rights could go back no further than the lessor.

Mr. Taylor, Referee in Chambers.—The grounds upon which the plaintiffs rely for setting aside the writ of sequestration resolve themselves into three. That the order of revivor is irregular; that Turley has brought his claim into the Master's office under the Decree in this suit, and that there are creditors whose claims are prior to that of Harris, and against whom the sequestration is therefore void. The notice of motion does not ask to set aside the order of Revivor itself.

The order of Revivor is objected to upon two grounds: first that the suit has been revived against the heirs of E. W. Meyers as if he had died intestate, while in fact he left a will by which he devised his estate to one Cross upon certain trusts. Cross is not made a defendant by the order of Revivor. The order appears to have been made in April, 1869; it was amended as to the names of some of the parties by an order made in the May following. and by a subsequent order the name of Sophia Meyers was struck out, she having moved against the order. The will of the original defendant, E. W. Meyers, was not proved until some time in 1871. The plaintiff. Turley, was not aware of the existence of this will, and seems to have taken proper steps to enquire into the true facts before taking out the order of Revivor as in the case of intestacy. The widow of the defendant was not aware of the existence of this will, for she made an affidavit that she had no will or testamentary paper in her possession, nor had she any knowledge of the existence of any such. The adult children of Meyers seem also to have been unaware of the will. They are all made parties defendants by the order of Revivor, but none of them moved against the order, nor did they inform Turley or his solicitor that such a will existed until after it had been proved Under these circumstances I cannot say there was any such suppression of material facts as to justify the setting aside of an *ex parte* order on the ground of concealment. The fact that the order makes the wrong parties defendants does not seem to me to make the order irregular in the sense which would justify my making an order in Chambers for setting it aside. Suppose instead of an order of Revivor this had been a bill filed by Turley against the children of Meyers, alleging his death intestate, that he did not so die would be no ground for taking the bill off the files as irregular The defendants would set up the facts by answer which would occasion a necessity for the plaintiff's amending. If the will was not discovered until too late for setting up such a defence by answer, the subsequent discovery of its existence would be a ground for allowing a supplemental answer

to be filed. (See 2 Beav. 236; 5 Beav. 432 *McKinnon* v. *Macdonald*, 2 Chy. Cham R. 28.) So here the subsequent discovery of the will, if the parties can shew they were not previously aware of its existence, would be a good ground for allowing them to move against the order of Revivor although the time allowed for doing so has long since elapsed.

To the other objections that the order of Revivor here is by Turley, as the assignee absolute of Harris' judgment, while he is only a mortgagee of his interest, there is the same answer as to the former. Had Turley filed a bill, the absence of any one representing the estate of Harris, interest, if it appeared on the face of the bill, might have been taken advantage of by demurrer, if it did not, the defendants, if aware of the objection, might by answer have set up the facts and alleged the want of necessary parties. How the fact is I do not know, but Turley may be legally the absolute owner of Harris' interest. The equitable interest of Harris' representatives may be a matter of private arrangement between the parties, in which case, so far as I can see, the defendants would not be prejudiced by the absence of any one representing Harris. If the facts were till recently unknown to them, and they are, by the absence of such representation, in any way prejudiced, it would, as in the former case, be a ground for giving leave to move against the order, but I cannot see that the order is irregular.

The second ground, that Turley has come in under the Decree in this suit, does not seem to furnish any reason for setting aside the writ of sequestration as irregular. If the Sequestration was regular when issued a proceeding taken by any of the parties subsequently cannot render it irregular. Such an act may render it inequitable that the party should any longer enjoy the benefit of the sequestration, and in such a case an application to the Court to discharge the sequestration would be made, just as in a suit like the present, the Court may, by injunction, restrain a judgment creditor from taking any proceedings by execution against the estate being administered. Whether, however, the Court would do so would depend upon a great many circumstances, and even if Chambers were the proper place, I have not before me sufficiently the facts upon which to decide such a question. Turley may be entitled to prove and also to hold the advantage he has gained under his sequestration. All these, however, are questions which cannot, I conceive, be raised and decided in Chambers upon a motion to set aside a writ for irregularity. The only remaining ground alleged for setting aside the writ is that there are prior creditors upon whom the sequestration is not binding. It is objected that there is no evidence on this motion that there are any prior creditors, and even if held to be sufficient evidence of the fact, the plaintiff cannot here set up the rights of these creditors. The plaintiffs, in answer to that, claim that a decree having been made for sale, they, as vendors, represent for all purposes connected with the sale and for getting incumbrances on the estate removed all the parties, and can, therefore, make this application. Perhaps they are right. Assuming that they are, and that there is sufficient evidence of there being creditors prior to Turley, the existence of such creditors does not make the sequestration irregular.

Apart from questions which may be raised as to whether these parties have not by their conduct lost their priority, the mere fact that these are persons who claim by a title paramount does not render a sequestration irregular.

The proper course to be pursued by any person who claims title to an estate or any property sequestered, whether by mortgage or judgment or otherwise, or who has a title paramount to the sequestration, was formerly to apply for leave to be examined *pro interesse suo*, 2 Dan. Pr. (Perk Ed.) 1268. Now he should take proceedings under general order 898.

That a judgment creditor, though prior, must, if the sequestration be executed, come before the Court in this way is clear from the language of Lord Eldon in *Angel* v. *Smith*, 9 Ves. 337, and a mortgagee with a clear title to take possession must adopt the same course: *Anon*, 6 Vesey 286 *Hamlyn* v. *Lee*, 1 Dickens, 94.

As to the position in which the tenants stand I do not think even if I had set aside the sequestration I should have ordered them to deliver up possession until they had received the notice specified in their leases.

They acquired their interests under a decree of this Court, regularly obtained, and a writ regularly issued, to enforce that decree. They had no knowledge of the existence of the will any more than Turley or the family of the testator.

Even if I had held the order of Revivor irregular, and that the suit of *Harris* v. *Meyers* had never in fact been revived, *White* v. *Hayward*, 2 Ves Sr. 461, would seem to be an authority for giving the plaintiff time to revive, keeping the sequestration in force until he could do so. As the plaintiffs have, even if entitled to have the sequestration set aside, mistaken the proper *forum*, I must refuse this application with costs.

Royal Canadian Bank v. Dennis.

Sale—Master's directions not followed.

When a sale has been had and the Master's directions have not been followed, the vendor will have to make out, at his own expense, that all parties interested have not been injured by such non-observance, in which case the Master will confirm the sale; otherwise not.

[Master's Office, April, 19, 1871.]

In this case the property had not been advertised as directed by the Master. After the sale took place the Master was asked to report upon it.

Mr. Boyd.—It is the duty of the Master to investigate whether he can approve of the sale under such circumstances. A case will have to be made by the vendor on affidavit or other evidence sufficient to show *primâ facie* that no detriment has resulted to any person interested from the omission to advertise as directed, upon which a warrant will issue calling on defendant and other persons (if any) interested in the proceeds of the sale to show cause why the Master should not approve of the sale This will be personally served, if Bill is *pro confesso*, and underwritten:

"The plaintiff not having complied with the Master's directions as to advertising the property sold herein to shew cause why such sale should not be approved of by the Master. Upon the return of this warrant the affidavit of ——

now filed in the Master's office will be read by the plaintiff."

Upon the return of the warrant the Master will determine upon what report to make. These proceedings must, of course, be had at the vendor's own expense. The suit is not to be burdened therewith.

Re S. S. McDonell.

Proceeding on Master's Warrant—Costs of day.

The Master will proceed upon his warrant, though the order of reference obtained *ex parte* be not served, so long as the warrant is not moved against.

As to when costs of day will be granted.

Mr. Boyd.—The Master will not look behind his own warrant and direction, that being based upon an order of reference; so long as the direction stands, the party is "bound" to comply with it. If a party fails to comply with the warrant, and in consequence an adjournment is occasioned by his conduct, or asked for by him, as in the present case, in order to comply with the warrant, the general orders give the Master power over the costs, and in such cases, I think, the party in default should pay the costs of the day to the other side—provided always that he has had sufficient time and opportunity to comply with the warrant. It is said here that the solicitor had not a proper opportunity to comply with the warrant, which directs the solicitor to bring in an account under oath of his receipts and payments as in the order mentioned, because the order to refer and tax, being *ex parte*, should have been, but was not served upon the solicitor, either before or with the copy of the warrant served. Now, I rather think that the client is not bound to serve this order until he seeks directly to compel the solicitor to take some step, or do or refrain from doing some act referred to in it. The order being brought into the Master's office is operative though not served. *Church* v. *Marsh*, 2 Ha., 652. If the solicitor did not know what account he was to bring in, the means of ascertainment were easily within his reach—either by demanding a copy of the order, or attending to examine it as brought into the Master's office. But this question does not really arise here. The solicitor asked as a favour to have further time to bring in his account, the client being ready to proceed and being prepared to waive any account. The rule laid down in *Re Dendy*, 21 Beav., 565, applies, and the solicitor should pay costs of day as the price of the indulgence.. See orders 296, 215, 217, 231.

Fuller v. Parnall.

Usury—Appropriation of payments.

Since the stat. 16 Vic., cap. 80, and before the abolition of the usury laws, a mortgage at 10 per cent. cannot be enforced for more than 6 per cent., though as to payments made without appropriation, the mortgagee can appropriate the money to the satisfaction of the usurious interest before coming into court.

In part payment of the usurious mortgage, another mortgage of a third party was assigned, which had not fallen due.

Held, that the amount of this mortgage could not be applied by anticipation to the payment of usurious interest not due.

Mr Boyd.—The law upon the Canadian statutes of usury is conclusively laid down in the judgment of the Court of Error and Appeal, in *Quinlan* v. *Gordon*, 7 U. C. L. J. 232 (which, strange to say, is nowhere else reported.) From this case it appears that *Stimson* v. *Kerby* in 7 Grant, 510, relied upon by the defendants, is over-ruled.

The mortgage in the present case was made during the period between 24th March, 1858 and 16th August, 1858, and is drawn for 10 per cent. interest.

If interest in excess of 6 per cent. has been paid by the defendant, he cannot get the benefit of that excess. The test is whether an action for money had and received would lie therefor; and this the Court of Appeal answers in the negative. They hold in effect that since P. S., 16 Vict., c. 80, the voluntary payment of any amount of interest by the borrower is legalised, and the lender may retain the amount, although this statute prohibits the lender from enforcing through the medium of a court more than 6 per cent. They put the excess upon the same footing as cases under the English statute prohibiting any action being brought for a debt due for small quantities of spirituous liquors.

The plaintiff had the right to appropriate the payments, if made by the debtor without appropriation to the payment of the 10 per cent. interest as far as they would go, and in the account brought in he has so applied the moneys, and I shall not disturb his account in this respect down to 10th July, 1870. I am justified in this by the holding in cases relating to spirituous liquors of the kind referred to by the Court of Error and Appeal. See *Cruickshank* v. *Rose*, 1 M. & Rob. 100; and *Philpott* v. *Jones*, 2 A. & E. 41.

As to $400 balance not yet paid of May's mortgage, the plaintiff cannot by anticipation apply this to the excessive interest and forestall the debtor's right to apply it. It stands now as a credit which the court is to appropriate, and this I do to satisfy the balance of interest at 6 per cent. due on 10th July, and the rest in reduction of the principal money—on which thereafter only 6 per cent. can be allowed.

COUNTY COURT CASES.

Brown v Heather.

Negligence—Accident.

The horse of the defendant being baulky, the defendant struck it with a whip to start it, his servant boy being on it. The horse started off and knocked down and injured the plaintiff in a lane along which the horse ran. The boy tried to stop the horse and called to the plaintiff. The plaintiff was nonsuited.

Held, that the nonsuit was right.

[Peterborough, January 12, 1872.]

This case was tried at the last sittings of the County Court of the County of Peterborough.

The declaration alleged, 1. That defendant, by negligence of his servant in the management of a horse, caused plaintiff to be thrown down, &c.

2. That defendant struck a horse and made him unmanageable and run against the plaintiff, whereby plaintiff, was injured, &c.

3. That defendant wrongfully and maliciously drove his horse against the plaintiff, whereby plaintiff was thrown down and injured, &c.

4. That defendant wantonly struck a horse ridden by one Cullen, and caused said horse to run against plaintiff, and plaintiff was knocked

down and injured, and prevented from attending to his business, &c. Special damage claimed.

Plea not guilty.

The plaintiff was examined as a witness, and stated that about 14th September last a horse, with a boy on his back, ran against him while walking in a lane in the town of Peterborough; and he detailed the injury he suffered from being knocked down. On cross-examination he said he did not know whose the horse was that struck him.

Robert Romane was with plaintiff at the time he was knocked over; the lane was a public thoroughfare; the horse was galloping; the boy was riding him barebacked, keeping him in. And he further said, on cross-examination, that it was purely an accident; boy doing his best to keep him in.

James Cullan, sworn.—I was last September in defendant's employment, (defendant was a butcher) carrying meat round; had been in his employment before that about six weeks; had had the mare all the time; she was about five years old; was riding bareback when accident happened; generally rode with a saddle; mounted at the west market door. Defendant gave me a basket of meat and put it on the shoulder of the mare; she baulked and would not go, and defendant took a whip and, I think, struck her; tried my best to hold her and turn her off the lane, but could not; she struck plaintiff and knocked him down. The mare never ran away before; once in a while baulked. Pulled her in at Ormond's Corner.

Cross-examined.—I meant to go up the main street; could not keep the mare out of the lane; had been accustomed to horses, riding with saddle and bare-back too; had regularly used the mare for about six weeks; had no difficulty but once before, when I managed her.

Re-examined.—It was a week before, that I had had the trouble; she only turned her head round; did not run away.

William Spence.—Defendant tried to start the mare up the main street; he took a whip out of a waggon and struck the mare, or struck at her; believe what defendant did, made the mare run away. The mare, I think, was only playing, not baulky.

Cross-examined.—Defendant treated the mare properly under the circumstances. I would call it simply an accident. The boy did all he could; cried out to give warning The lane is narrow; a good many waggons pass through it. I am with Winch (a butcher in the market). Quite common for boys (butchers) to ride bare-back.

Re-examined.—I think defendant tried to lead the mare before he got the whip.

John Kelly was examined as to special damages (plaintiff was a barber), and Dr. Harvey as to amount of injury.

At the close of the plaintiff's case, the defendant's counsel moved for a non-suit on the ground that there was no case to submit to the jury, as the evidence only showed that an accident had happened, and the learned judge being of that opinion, the plaintiff was non-suited.

In Term the plaintiff's counsel moved for a rule nisi, to shew cause why the non-suit should not be set aside and a new trial had.

Dennistoun, Co J. — Feeling strongly that such a rule would not be made absolute. I reserved the application, requesting plaintiff's counsel to cite any cases he relied on in support of his own view that the non-suit was improper, and I have been referred to the following :—

Peters v. *Devinney*, 6 U. C. C. P., 389. where the injury was caused by the erection of a dam; plaintiff's evidence giving him a right to a verdict.

Robinson v. *Bletcher et al.*, 15 U. C. Q B, 159, where, for anything that appears, plaintiff may have made out a *primâ facie* case; but the judgment of the Court shews that on such evidence as the plaintiff gave in the present suit, he is not entitled to recover.

Ridley v. *Lamb*, 10 U. C. Q. B., 354. The defendant herein was guilty of an improper act and plaintiff suffered damages. In the present case the evidence of Cullan and Spence shews defendant not to have been guilty of an improper act.

Goodman v. *Taylor*, 5 C. & P., 410. In this case two of the plaintiff's witnesses stated that the pony and chaise that caused the accident were standing on the street with no one to look after them, and the case went to the jury on contradictory evidence.

Rex v. *Timmins*, 7 C. & P., 500. There was here evidence to shew that defendant was racing on a highway, and so doing an improper act.

I do not think that these authorities sustain the plaintiff's contention that the case should have gone to a jury; on the contrary, the view I took at the trial seems to be sustained by the cases I shall now refer to

In *Deverill* v *G. T. R. Coy.*, 25 U. C. Q. B., 517, Hagarty, J., said, "We have to consider the motion for a non-suit, and are at once met by the difficulty which the cases present as to what shall be considered sufficient evidence for a jury. It is not enough that there was some evidence or a mere surmise that there may have been negligence on the part of the defendants, that clearly would not justify the judge in leaving the case to the jury." And the learned judge also quoted from the judgment in *Cotton* v *Wood*, 8 C. B N. S., 573, where it is said that, "There is another rule of the law of evidence which is of the first importance, and is fully established in all the Courts, viz, that when the evidence is equally consistent with either view—*with the existence or non existence of negligence*—it is *not competent* for the judge *to leave the matter* to the *jury*. The party who affirms negligence has altogether failed to establish it. That is a rule which should never be lost sight of." In the case of *Cotton* v *Wood*, Erle, C. J., says, "Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of care on the one side or the other, the party who founds his claim upon the imputation of negligence fails to establish his case."

Hammack v. *White*, 11 C. B. N. S., 588, and *Jackson* v. *Hyde*, 28 U. C. Q B..294 are to the effect. In the latter case, Wilson, J., remarks, "It is notorious, there are many cases in which jurors are not the most dispassionate or most competent persons to try the rights of parties, and an action of this kind comes within the class to which I have alluded. In such actions the

judge should firmly assume the responsibility of determining himself, whether sufficient evidence has or has not been given to compel him to leave the case to the jury."

The rule must be refused.

Rule refused.

ENGLISH REPORTS.

COURT OF PROBATE.

In the Goods of Foster.

Will—Substituted executors.

A testator by his will appointed "my wife my sole executrix, and in default of her, I nominate and appoint as my executors, &c.," A. B. and C. D.

The wife took out probate, and at her death the court held that A. B. and C. D. were the substituted executors of the husband, and granted probate to them of his estate in preference to the wife's executors.

[Nov. 21, 1871, 25 L. T., N. S., 763.]

G. H. Foster, late of Regent's-park, in the county of Middlesex, died 1st Dec., 1858, having duly executed a will, bearing date 24th July, 1857. The appointment of executors was in the following terms:

"I hereby authorise my executrix and executors hereinafter named, to continue any security or securities which I may die possessed of, for any term in their discretion not exceeding five years from my death, notwithstanding any trusts in this my will contained, and I nominate and appoint my said wife the sole executrix of this my will, and in default of her I nominate and appoint the said John Knowles and Richard Foster to be executors of this my will."

Probate of the will was granted to the wife, Maria Isabella Foster, on 24th Dec., 1858, and she died 25th May, 1871, having duly executed a will dated 4th Nov., 1870, whereby she appointed the said John Knowles and Richard Foster, together with F. Moseley, Benjamin Hugh Allen, Christopher Proctor, and John Rae Campbell to be executors and trustees. Probate of this will was granted on 5th July, 1871, and the question now arose whether the executors of the said Maria Isabella Foster were the personal representatives of G. H. Foster, her husband; or whether in default howsoever of Maria Isabella Foster, as executrix, the said John Knowles and Richard Foster, were entitled to take probate as substituted executors.

Dr. *Swabey* moved for a grant to them, and referred to *In the Goods of Johnson*, 2 Sw. & Tr. 595; 7 L. T. Rep. N.S. 357.

Lord Penzance.—This is a question of construction of what the testator meant when he said, "I appoint my wife my sole executrix, and in default of her, two others, A. B and C. D." The testator, by the words of the will, appears to have given the preference to his wife that she should be his executrix as long as she was able to act—but then comes the question whether the substitution of the two other executors was to take place in the event of the wife not acting at all, or whether it was to happen in case of some intervening circumstance like that of death, by which the wife would no longer be able to act. I think the will must not be construed with over-technical strictness. We must look to the object the testator had. It was that his wife should administer as she has done, and his reasonable wish was that she should administer as long as she could, or until her death put an end to the administration. In either one event or the other—in the event of her being unable to administer, or in the event of her death, then the others would be substituted. That is the reasonable interpretation of this will, and I am prepared to make a grant to the two other executors in accordance with that interpretation.

Teague and Ashdown v. Wharton and another.

Testamentary suit—Administration to a nominee of both parties refused.

Except under very special circumstances the court as a general rule will refuse to make a grant of administration to the nominee of the next of kin, who has himself no interest, even though all the next of kin may consent.

[Nov 21, 1871, 25 L. T., N. S. 764].

Emily Harvey Jeffries, late of Spring-grove, Isleworth, in the county of Middlesex, died a widow, and without parent or children. She and her husband died at different places within two hours of each other, and there was a question as to the survivorship.

By her will, dated 14th Oct., 1870, she had nominated her husband her sole executor and universal legatee. Mr. Jeffries also left a will, by which he had named his wife sole executrix and universal legatee.

The next of kin and persons entitled in distribution of the estate of Mrs. Jeffries were one brother, Mr. C. R. Teague, and three sisters, Mrs. F. M. Ashdown, Mrs. L. S. Wharton, and Mrs. Elizabeth Anne Owen. The two first named of these were about to apply for a grant of administration, but were met by a caveat lodged on the part of Mrs. Wharton To avoid litigation it was subsequently arranged among the parties interested, that as they could not agree upon the appointment of any one of themselves as administrator, they should all consent to the appointment of a stranger—Mr. James Waddell

Dr. *Tristram*, on behalf of the defendant, accordingly moved for a grant of administration to Mr. James Waddell, as nominee of the next of kin. He cited *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467.

Inderwick consented on behalf of the next of kin of the husband. *Cur. adv. vult.*

Nov. 28.—Lord Penzance.—In this case the court was asked to make a grant to the nominee of the next of kin. The court expressed some difficulty at the time, upon which the case was cited of *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467. From that case it appears that the court has done something similar. In that case there was a litigation. The next of kin came before the court, and the court made a grant, under the 73rd section, to the nominee of the next of kin. This was done on the authority of a case *In the goods of John Holroyd*, and I have had that case looked out to ascertain what were the facts. I find that in that case the next of kin were permitted to nominate somebody other than themselves to take the grant. There were special reasons there, because the persons put forward were persons who had been executors of the will

of the father of the next of kin, and they had had the management of the father's estate, of which the property in issue consisted, up to the death of the party whose administration was contested. The case, therefore, forms no authority for a general proposition that the court should permit the parties entitled to renounce in order to make a grant to a third party who has no interest, but who is nominated by them. Since *Farrell* v *Brownbill* the court has decided another case—*In the goods of Peter Richardson*, (40 L. J. 36, P. & M.; 25 L. T. Rep. N. S. 348), of which the marginal note is, "The court refused, in the absence of special circumstances, to make a grant to the nominee of the next of kin, although she was an old lady of eighty, not able to transact business." In refusing that grant several cases were cited, and the court pointed out that it would be an inconvenient practice to make the grant in the manner asked for without some special circumstances, because it would result that people who knew nothing of their own rights would be induced to put them in the hands of third persons, and the grant passing to a nominee would become vested in the hands of a third person who had no interest in the administration. The court, therefore, refused to make the grant, and refused to adopt as a general rule the proposition that if the next of kin chooses to renounce and nominate a third person to take the grant, the court will therefore make the grant to this third person. The more I consider the matter the more I am satisfied that that is the way in which the court ought to look at these cases. There being no special circumstances here, the grant must go to the next of kin, and if they choose to renounce, then to any person entitled who may apply.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER, AND OCTOBER, 1871.

Account.—See Executors and Administrators; Partnership, 2; Set-off, 1.

Action.—See Set-off, 2.

Adjudication.—See Bankruptcy, 1.

Adverse Possession.

A., entitled as tenant in tail to an estate, held the same as an agent for B. for twenty years. *Held*, that B. had acquired title by adverse possession.—*Williams* v. *Pott*, L. R. 12 Eq. 149.

Agency.—See Principal and Agent.

Agreement.—See Contract.

Agricultural Purposes.—See Tillage.

Assignment.—See Author; Bankruptcy, 1; Priority.

Assurance.—See Covenant, 2.

Attorney.

An attorney has no implied authority, after judgment in favor of his client, to enter into an agreement binding his client to postpone execution.—*Lovsgrove* v. *White*, L. R. 6 C. P. 440.

Author.

The plaintiff employed one W. to write a play for him, the plaintiff suggesting the subject. The play being given to him, the plaintiff made alterations and additions, one scene being entirely new. W., on receiving payment, gave a receipt as follows: "Received of [the plaintiff] the sum of four pounds, account of fifteen guineas for my share, title and interest as co-author with him in the drama intituled," &c., "balance to be paid on assigning my share to him." W. died, and the plaintiff, as joint author, sued the defendant for infringement. *Held*, that the above facts did not constitute the plaintiff author or proprietor of the play, or joint author with W.; and that there was no assignment to the plaintiff.—*Levy* v. *Rutley*, L. R. 6 C. P. 523.

Average.—See Bill of Lading.

Baggage.—See Luggage.

Bank.—See Executors and Administrators; Partnership, 2; Set-off, 1; Ultra Vires.

Bankruptcy.

1. Three persons assigned the firm property for the benefit of creditors. Previously, one partner had accepted, in the name of the firm, a bill of exchange in which the drawer's name was left blank, giving the bill to his agent for negotiation. After said assignment, a drawer's name was inserted in the bill, which was then indorsed to a *bona fide* holder for value. The holder obtained an adjudication of bankruptcy against the firm, grounded on the assignment. *Held*, that the adjudication must be reversed, as there was no debt on the bill until the indorsement to the holder, which was after the assignment.—*Ex parte Hayward*, L.R. 6 Ch. 546.

2. A. executed a bond to B. as follows: Reciting that, whereas A. had agreed to sell B. £1100 consols assigned to B. by deed of even date, to which A.'s wife was entitled on the death of her mother; and whereas A.'s wife might survive him, and refuse to confirm the said assignment, it was conditioned that if A. should within six months after his wife's mother's death obtain the transfer of the consols, or if the trustees of said consols should transfer the same to B., the bond was to be void. Before breach of condition of the bond, A. was discharged in bankruptcy from a "debt payable on a contingency," and a "liability to pay money on a contingency." *Held*, that A. was not discharged from his liability on the bond.—*Kent* v. *Thomas*, L. R. 6 Ex. 312.

See Bills and Notes, 2; Set-off, 1; Settlement.

Bequest.—See Devise; Legacy; Will.

Bill of Lading.

The owner of a ship chartered it to C. on the following terms: C. was to ship a full cargo; fifty running days were allowed for loading, and ten days' demurrage at £8 per day; the owner to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibility to cease on shipment of the cargo. A full cargo was not shipped, and the ship was detained eighteen days in addition to the ten days' demurrage. The captain signed a bill of lading whereby the cargo was to be delivered at London, "as per charter-party," to the consignee, "he paying freight and all other conditions or demurrage (if any should be incurred) for the said goods, as per the aforesaid charter-party." A copy of the charter-party was sent to the consignee with the bill of lading. The owner claimed a lien for £80 demurrage, for dead freight, and for said eighteen days' detention. *Held* (Bramwell and Cleasby, BB., dissenting), that there was no lien for damages for short loading under the term "dead freight" in the charter-party. Also (Willes and Brett, JJ., dissenting), that there was a lien for the ten days' demurrage. By the whole court, that there was no lien for the eighteen days' detention. Judgment of Queen's Bench affirmed. *Gray* v. *Carr*, L. R. 6 Q. B. (Ex. Ch.) 522.

See Bills and Notes, 3; Freight, 2.

Bills and Notes.

1. A note payable on demand, dated Feb. 16, 1864, was presented for payment Dec. 14, 1864, and it was held on the circumstances of the case that the delay in presentment was not unreasonable.—*Chartered Mercantile Bank of India, London, and China* v. *Dickson*, L. R. 3 P. C. 574.

2. A. being insolvent, his father agreed to give notes for ten shillings on the pound to trustees for the benefit of creditors, who were to sign a deed of composition under the English Bankrupt Act. A creditor brought suit against A., averring that the composition deed was obtained by fraudulent representations. The suit was referred to an arbitrator, who gave judgment for the creditor. The creditor afterwards brought the present action against A.'s father on said notes, with one count in detinue, and a second on the notes. He alleged that the above judgment was void, as the composition deed was binding upon him under the Bankrupt Act. *Held* (reversing judgment of Queen's Bench), that the count in detinue failed, as the defendant was not possessed of the notes; that the plaintiff could not succeed on the second count, as it had not been found that the composition deed, the consideration of the notes, was valid. Also, that the plaintiff, by having brought action and obtained judgment against A., had repudiated the composition and the notes, and destroyed the consideration for which the notes were given. It appears the creditors were not *estopped* from alleging that the composition deed was binding upon him, as this action was not against A.—*Latter* v. *White*, L. R 6 Q. B. (Ex. Ch.) 474; s. c. L. R. 5 Q. B. 622.

3. A. obtained from a banking company a letter of credit as follows: "You are hereby authorized to value on this bank . . against cotton purchased in conformity with the letter of instructions . . . such drafts to be covered by shipping documents, say invoices and bills of lading of cotton, addressed to this company, and forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honor such drafts." Bills were accepted against shipping documents representing cotton of less value than the bills. The bank was ordered to be wound up, and the holders of the bills, with knowledge of said facts, claimed to prove their full amount. *Held*, that the bank was only debtor for the value of the bills less the net proceeds of the cotton applicable to them. The bill-holders had no lien on the cotton whereby to make the bank trustee for them of its proceeds.—*Banner* v. *Johnson*, L. R. 5 H. L. 157.

See Bankruptcy, 1.

Bond.—See Bankruptcy, 2.

Boundary.—See Lease.

Broker.—See Principal and Agent.

Burden of Proof.—See Settlement, 1.

Canal.—See Easement.

Cargo.

A ship-owner received oil-cake in good order and condition, undertaking to deliver in like good order and condition, dangers of the sea only excepted. The oil-cake was surrounded by animal and vegetable matter, whose putrescible nature, when deprived of ventilation, caused the oil-cake to deteriorate. *Held*, that the damage was not caused by a danger of the sea, and the ship-owner was therefore liable.—*The Freedom*, L. R. 3 Pw. C. 594.

See Bill of Lading; Freight, 1.

Carriage.—See Hackney Carriage.

Carrier.—See Luggage.

Charge.—See Deed of Settlement; Priority.

Charity.

Devise of lands and tenements to the master, wardens, &c., of the Company of Merchant Taylors, "to this intent, and upon this condition, that they, the said master and wardens, shall yearly, every year, for ever, of and with the rents and profits of the said lands," provide for twelve poor men and twelve poor women of London certain garments of a specified price; with a direction that the chamberlain and town-clerk of London should see that the garments were given, receiving 10s. apiece out of the rents for so doing; and so that the whole residue of the rents the master and wardens should maintain and gather into a stock, and therewith repair, and, if need be, rebuild, the tenements; and in case they should be remiss in delivering the said garments, then others to enter and hold said lands, &c. At the death of the testator the income of the tenements was more than required for the said charity, and subsequently became very much greater. *Held*, that the company were not entitled to the surplus income for their own benefit, but were bound to apply it to charitable purposes.—*Merchant Taylors Co.* v. *Attorney-General*, L. R. 6 Ch. 512; s. c. L. R. 11 Eq. 35.

See Legacy, 2, 3.

Charter.—See Ultra Vires.

Charter-party.—See Bill of Lading; Freight, 2.

Codicil.—See Will, 2.

Company.

1. By the articles of a company it was provided that a director should vacate his office if he participated in the profits of any contract with the company without declaring his interest therein to the other directors. It was *held* that this clause did not merely prescribe acts which would vacate the office of director, but that it made it lawful for a director to contract with the company on giving proper notice of his interest.—*Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 Ch. 558.

2. The plaintiff, a debenture holder, obtained judgment on the same against the defendant railway. Subsequently, a majority of debenture holders agreed, under the R. W. Companies Act of 1867, to a scheme of accepting stock in lieu of principal and arrears of interest due; but the plaintiff in no way assented to the scheme, and obtained execution on his judgment. The company prayed an injunction. *Held*, that the plaintiff was still a debenture holder, and bound by the scheme. Injunction granted.—*Potteries, Shrewsbury and North Wales Railway Co.* v. *Minor*, L. R. 6 Ch. 621.

See Execution.

Composition Deed.—See Bills and Notes, 2.

Condition.—See Bankruptcy, 2; Covenant 4; Lease; Settlement, 3.

Consignee.—See Bill of Lading.

Construction.

By statute, petroleum "shall include such rock oil, and oil made from petroleum, &c., as gives off inflammable vapor at a temperature of less than 100° F." *Held*, that petroleum proper, whether giving off inflammable vapor under 100° F. or not, was within the Act.—*Jones* v. *Cook*, L. R. 6 Q. B. 505.

See Bill of Lading; Charity; Company, 1; Covenant, 3, 4; Deed of Settlement; Devise; Execution; Gaming; Hackney Carriage; Lease; Legacy; Reservation; Settlement, 2, 3; Tax.

Contract.—See Attorney; Company, 1; Covenant, 1; Freight, 1; Lease; Principal and Agent; Sale; Settlement, 3.

Contribution.—See Legacy, 1.

Copyright.—See Author.

Corporation.—See Lease.

Costs.

1. Costs of trustee who was served with, and appeared upon, a petition by tenant for life for payment of dividend, ordered to be paid out of the dividends.—*Ex parte Smithett*, L. R. 12 Eq. 111.

2. A wife instituted a suit against her husband for dissolution of marriage, but subsequently filed an application for its dismissal. The court ordered the application to stand over for a fortnight, that the wife's attorney might file his bill of costs, and obtain an order for their taxation.—*Dixon* v. *Dixon*, L. R. 2 P. & D. 253.

3. An executrix propounded a will, and a party pleaded undue influence, giving the executrix notice that he only intended to cross-examine the witnesses produced in support of the will. The party was *held* liable to the executrix for costs.—*Harrington* v. *Bowyer*, L. R. 2 P. & D. 264.

Counsel.—See Attorney.

Court.—See Power.

Covenant.

1. A., for himself, his heirs, executors, and administrators, covenanted by deed with B., his executors and administrators, that he would at any time thereafter, at the request of B., execute to B. a lease of certain premises, with certain covenants, for twenty-one years, to begin at the date of the agreement. No

lease was ever made, but B. entered and paid rent until his death, after which his personal representative entered and paid rent. *Held*, that a claim against B.'s estate for rent accrued since his death, and for a sum which would have been due under the covenants if the lease had been executed, that such claims were of the nature of specialty debts, and must be allowed as such.—*Kidd* v. *Boone*, L. R. 12 Eq. 89.

2. A. assigned to trustees an equitable interest in copyholds, with a covenant for further assurance. A. subsequently was admitted to the copyholds, sold them, applying the purchase-money to his own purposes, and died insolvent. *Held*, that the covenant entitled the trustees to prove for a specialty debt.—*Blackburn* v. *Dickson*, L. R. 12 Eq. 154.

3. A lessee for the lives of A., B., and C., and the survivor of them, by deed reciting his lease, conveyed to the plaintiff, to hold for the lives of A., B., and C., and the survivor of them, and covenanted that the said lease was a valid and subsisting lease for the lives of A., B., and C., and the survivor of them. B. was dead at the date of said covenant. *Held*, that the covenant was that the lease was valid and subsisting, not that the three lives were all still subsisting. The mention of the three lives was merely matter of description of the lease.—*Coates* v. *Collins*, L. R. 6 Q. B. 469.

4. A lease contained a covenant that the demised premises should be used for a post-office, and for no other purpose. The post-office issued licenses for men-servants, horses, carriages, dogs, &c. *Held*, that issuing such licenses was analogous to issue of stamps and money-orders, which formed part of the duties of the office when the lease was made; and that there was no breach of the covenant.—*Wadham* v. *Postmaster-General*, L. R. 6 Q. B. 644.

See Bankruptcy, 2; Settlement, 3.

Credit, Letter of.—See Bills and Notes, 3.

Cross Action.—See Set-off, 2.

Cy Près.—See Charity; Legacy, 2, 3.

Damages.—See Cargo; Freight, 1; Receipt; Set-off, 2.

Danger of the Seas.—See Cargo.

Dead Freight.—See Bill of Lading.

Debenture.—See Company, 2.

Debt.—See Covenant, 2.

Deed.—See Bills and Notes, 2; Covenants, 3; Seal.

Deed of Settlement.

In the deed of settlement of a Baptist chapel it was provided that the minister should be subject to removal by order of the church, made at one meeting and confirmed at a subsequent. Notice may be given of the object of each meeting. Notice was given that a meeting would be held for the purpose of bringing charges against the minister. A meeting was held, and it was resolved that the minister "having on different occasions uttered deliberate falsehoods," and "also having on several occasions been seen drunk," he was "not a fit and proper person to occupy the position of pastor, and that his office of pastor cease forthwith." Notice was given of a second meeting, for the purpose "of confirming the resolutions passed" at the first meeting, and at the second meeting it was ordered "that the above minutes be confirmed." *Held*, that vague and insufficient reasons having been assigned for the minister's removal, the latter was invalid, but if no reasons had been assigned, the same could not have been set aside. And that the notice of the second meeting should have set forth the resolution which was to be confirmed.—*Dean* v. *Bennett*, L. R. 6 Ch. 489.

Detinue.—See Bills and Notes, 2.

Devise.

1. Devise for testator's two daughters for life as tenants in common, and after their respective decease, the trustees to convey to their respective husbands and their heirs: provided, that if either daughter should die unmarried, her share in trust for the other daughter for life, and on her decease the whole to her husband and his heirs. A daughter married, and her husband died, devising to his wife and her heirs the estate he was entitled to under the above will. A purchaser from said daughter refused to complete his purchase on the ground of defect in title. *Held*, that if the said daughter should die, leaving a second husband surviving her, his title would be a good one, her first husband not having been entitled to an absolute estate in fee in remainder expectant on his wife's death.—*Radford* v. *Willis*, L. R. 12 Eq. 105.

2. A testator gave his estate to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family." The widow gave an annuity to an illegitimate son of the testator's son. *Held*, that the gift to the widow was absolute, and that there was no trust for children under the will. The annuity was valid.—*Lambe* v. *Eames*, L. R. 6 Ch. 597; s. c. L. R. 10 Eq. 267; 7 U. C. L. J., N.S., 170, 222.

3. A testator devised as follows: "I devise and bequeath to my mother, all my real and

personal estate, and knowing that what I give to my mother will become the property of her husband, my step-father, I therefore declare the intention of my will to be that my mother's husband shall hold and enjoy all my said real and personal estate to him, his heirs, executors, administrators, and assigns, for ever, and to be absolutely at his free will and disposal: provided, that he does not at any time dispose of any portion of my said property to any of my late father's family." *Held*, that the mother took an estate for life in the real estate, and the step-father a remainder in fee.—*Gravenor* v. *Watkins*, L. R. 6 C. P. (Ex. Ch.) 500.

4. A testator devised a certain estate to his son J. for life, remainder to J.'s children in fee, "and in case my son J. shall depart this life without leaving lawful issue," said estate "equally between my sons G. and R. in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned, in case my son J. should leave a widow." The testator then devised certain other estates to G. and R. in identical terms. Then followed this proviso: "Provided, that in case any or either of my said sons shall depart this life leaving a widow, then I give the premises so specifically devised to such one or more of them dying, unto his widow" for life. R. died unmarried. G. died leaving a widow, who claimed a life-estate in the moiety of R.'s estate, which had come to G. *Held*, (by Cleasby, Pigott, Channell, and Bramwell, BB., reversing judgment of C. P. Kelly, Blackburn, and Mellor, JJ., dissenting), that G.'s widow took a life estate only in the premises devised to G., and not in said moiety of R.'s estate.—*Melsom* v. *Giles*, L. R. 6 C. P. (Ex. Ch.) 532; s. c. L. R., 5 C. P. 614.

See Charity; Executors and Administrators: Partnership.

Disseisin.—See Adverse Possession.

Divorce.—See Costs, 2.

Drain.—See Watercourse.

Easement.

A canal company, under an Act of Parliament, diverted the greater part of the water of a brook into a canal which did not return the water to the brook. More than forty years afterward the canal was discontinued, and its water returned to the brook, and the plaintiff's land bordering on the brook was flooded in consequence. *Held*, that plaintiff had acquired no easement of having the water in the canal diverted from the stream.—*Mason* v. *Shrewsbury and Hertford Railway Co.*, L. R. 6 Q. B. 578.

See Watercourse.

Education.—See Religious Education.

Ejectment.—See Lease.

Election.—See Principal and Agent, 2.

Endowment.—See Legacy, 3.

Entry.—See Lease.

Equity.—See Partnership, 1; Priority; Receipt.

Equitable Interest.—See Covenant, 2.

Error.

Error on a judgment in favor of a husband and wife, assigning that said alleged wife was in fact wife of another man. *Held*, that such fact should have been pleaded in bar or abatement, and that the assignment of error was bad.—*Metropolitan Railway* v. *Wilson*, L. R. 6 C. P. 376.

Estate for Life, &c.—See Devise, 3; Legacy, 1; Tenant for Life, &c.

Estoppel.—See Bills and Notes, 2; Lease; Receipt.

Evidence.—See Inn-keeper; Legacy, 2; Negligence; Principal and Agent, 2; Seal; Set-off, 2.

Execution.

The Companies' Act enacts that any execution put in force after commencement of winding-up process, shall be void. A creditor took out execution upon a judgment against a company, and handed it to the sheriff three hours before the company began winding-up process, but possession was not taken until three hours after the winding-up was begun. *Held*, that the execution was not "put in force" until the sheriff took possession, and was void.—*In re London and Devon Biscuit Co.*, L. R. 12 Eq. 190.

See Attorney.

Executors and Administrators.

A bank opened an account with F.'s executrix, entitling it "F.'s executors' account," and advanced money to her on the security of title-deeds of F.'s estate, deposited by her. F.'s executors were empowered to charge his real estate in favor of his personal estate. The executrix expended the above money for her "own purposes, and in various speculations with regard to the purchase, sale, and farming of land." *Held*, that the bank could prove against the general estate of the testator for a balance remaining unpaid after realizing the security.—*Farhall* v. *Farhall*, L. R. 12 Eq. 98.

See Costs, 3; Covenant, 1.

Flats.—See Lease.

Fraud.—See Bills and Notes, 2.

Frauds, Statute of.—See Principal and Agent, 2.

Freight.

1. An owner of a vessel agreed to take a cargo and proceed to London, and there deliver at a good and safe wharf. The vessel, with cargo on board, was run into by a tug in the Thames, sunk, and raised in a few days, when she continued her voyage, and finally drew up near a wharf. The same day notice was sent to the freighter requesting him to name a wharf for delivery of the cargo, but he declined so to do, or to receive the cargo. The next day the vessel and freight were arrested in a suit by the tug. The owner brought suit against the freighter. *Held*, that the owner was entitled to recover damages for refusal to accept the cargo, equal to the amount of freight that would have been due if the cargo had been delivered. The freighter's breach of contract was previous to the arrest by the tug; and in any event, he could have had the cargo on either his or the owner's paying the freight into court.—*Stewart* v. *Rogerson*, L. R. 6 C. P 424.

2. Plaintiff chartered a vessel to the defendants at a certain rate of freight, and the master was "to sign bills of lading at any current rate of freight required, without prejudice to the charter-party; but not under chartered rates, except the difference is paid in cash." The defendants required the master to sign bills of lading at rates under the chartered rates, without receiving the difference in cash, on the assurance that all would be made right when the vessel had finished loading. The difference was not paid, and the vessel was lost on the voyage. *Held*, that the difference was recoverable.—*Byrne* v. *Schiller*, L. R. 6 Ex. (Ex. Ch.) 319.

See Bill of Lading.

Gaming.

By statute, every person betting in a public place, with any table or instrument of gaming, at any game of chance, may be convicted as a rogue. The defendants had the following machine at a race-course, for which they solicited subscriptions. The machine had a certain number of holes, each of which was appropriated to a horse. Behind each hole moved numbers. A person wishing to bet on a particular horse gave the defendants a sovereign, and received a ticket representing said horse, and then the number behind the hole standing for the horse betted on was increased one. Thus the numbers opposite the holes showed the number of persons who had bet on the horse it represented. There was also a hole having behind it a number which registered the total number of bets. Therefore, any one looking at the machine could tell the number of bets on each horse, and the total of bets on all the horses. The holders of tickets representing the winning horse divided the total of bets. *Held*, that the machine was not simply a register of bets, but an instrument of gaming, and that the horse-race was thereby converted into a game of chance.—*Tollett* v. *Thomas*, L. R. 6 Q. B. 514.

Guaranty.—See Sale.

Hackney Carriage.

The respondent owned a brougham which, by arrangement with a railroad, he stood within their station, and while so there he solicited two passengers to engage him, which neither did. *Held*, that the brougham was a "hackney carriage plying for hire" within 32 & 33 Vict. c. 115.—*Allen* v. *Tunbridge*, L. R. 6 C. P. 481.

Horse-race.—See Gaming.

Husband and Wife.—See Error; Religious Education.

Illegitimate Children.—See Devise, 2.

Incumbrance.—See Priority.

Indorsement.—See Bankruptcy, 1.

Infant.—See Religious Education.

Infringement.—See Author.

Injunction.—See Company, 2; Receipt; Watercourse.

Inn-keeper.

The plaintiff went to a hotel in Bristol, having in his pocket a bag of money. He went to his room and to bed, leaving his door, in which was a key, unlocked. In the morning he found that his money was stolen. *Held*, that while leaving the door unlocked did not necessarily exonerate the inn-keeper from his common law liability, yet it was rightly left to the jury to determine whether the plaintiff neglected to use ordinary care, in which case the inn-keeper would be exonerated.—*Oppenheim* v. *White Lion Hotel Co.*, L. R. 6 C. P. 515.

Insolvency.—See Settlement, 1.

Insurance.

The plaintiffs, brokers, were directed to effect insurance on hides shipped on the Socrates, Capt. J. C. The defendant's office had a list of vessels, in which were the Socrates, Capt. A., a Norwegian vessel, and the Socrate, Capt. J. C., an old French vessel. The insurance clerk asked the plaintiff's clerk whether the Socrates was the vessel meant, and the latter clerk replied in good faith that "he thought so." Insurance was effected accordingly, January 24. On February 4, the plaintiffs insured for different principals, hides

by ships to be declared, and subsequently declared for hides on the Socrates. The hides were in fact shipped in both instances on the Socrate, which was afterward lost. The jury found that both parties to the second insurance meant to insure hides on the vessel on which they were shipped, whatever her name might be. *Held*, that in the first case there was a misrepresentation, the statement of belief being tantamount to an assertion of the fact; and that the defendants were not liable; but otherwise as to the second insurance, as that was effected in a different transaction, in which, considering the finding of the jury, the misnomer was of no consequence.—*Ionides* v. *Pacific Insurance Co.*, L. R. 6 Q. B. 674.

Joint Author.—See Author.

Judgment.—See Bills and Notes, 2; Error; Execution.

Judgment Creditor.—See Company, 2.

Jurisdiction.—See Partnership, 1.

Jury.—See Inn-keeper.

Landlord and Tenant.—See Lease.

Lease.

1. A corporation passed a resolution in 1860, agreeing to let to the plaintiff "the frontage" of a field, "with the flat part of the beach opposite." The plaintiff entered and paid rent, but, in 1864, receiving notice to quit, he asked for a lease, which was refused by the corporation, which, after some negotiation, brought ejectment against the plaintiff. The plaintiff filed a bill for specific performance, and to restrain the ejectment. *Held*, that the corporation was bound by acquiescence, and must perform their agreement, though not under seal. And that the boundaries of the field on the water were lines drawn from the extremities of the field perpendicular to the sea-coast, and extending to high-water mark.—*Crook* v. *Corporation of Seaford*, L. R. 6 Ch. 551; s. c. L. R. 10 Eq. 678.

2. J. K. leased land described as containing 5 A. 2 R. 20 P., to L. at a rent of £100 a year. The lease contained these words, "It shall be lawful for the said J. K., at any time during the continuance of this demise, upon giving to the said L. one month's notice, in writing, of his or their (*sic*) intention to resume, for building purposes, the possession of any portion of the premises hereby demised, it shall be lawful for the said J. K., his heirs or assigns, to enter into such possession, and thereupon and on obtaining such possession, it is hereby agreed that the portion of ground so taken should be valued at the rate of £20 per acre, and that the rent hereby reserved shall be proportionally reduced." J. K. covenanted to stand seised to the use of himself and V. K. as tenants in common. Notice of intention to resume the entire premises, signed by J. K. and V. K., was given to L., who subsequently brought ejectment. *Held*, that J. K. and V. K. were entitled to resume possession of the whole of the land, and were not restricted to five acres. 2. That the notice given was good. 3. Notice having been given and ejectment brought, actual entry was unnecessary. 4. *It seems* that the above clause was not a technical condition capable of being destroyed by the above severance of the reversion; and if it were, J. K. and V. K. would have the rights of J. K. under the lease, by 23 & 24 Vict. c. 154.—*Liddy* v. *Kennedy*, L. R. 5 H. L. 134.

See Covenant, 1, 3, 4.

Legacy.

1. A testator gave his personal estate to his wife for her absolute use and benefit; and certain freehold estate was charged with payment of his debts, with surplus to his wife; other real estate he devised absolutely to his wife; and other real estate to his wife for life, remainder over. Said freehold estate was insufficient to pay his debts. *Held*, that the specifically devised personal and real estate must contribute ratably.—*Powell* v. *Riley*, L.R. 12 Eq. 175.

2. In 1868, a testatrix bequeathed a sum to the treasurer for the time being of the fund for the relief of the clergy of the diocese of W. Said diocese, in 1868, included the archdeaconries of W. and C., but until 1837, included only the archdeaconry of W. Until 1837, there was a society of the diocese for the above purpose, and this society, when the diocese was enlarged, was restricted to the archdeaconry of W. There was a similar society in the archdeaconry of C. Evidence was offered to show that the testatrix and her parents had contributed to the society in the archdeaconry of W. *Held*, that the evidence was admissible, but that the legacy was to a charitable object, to which effect must be given by dividing the sum between the two societies.—*In re Kilvert's Trusts*, L. R. 12 Eq. 183.

3. Bequest of personal estate "in aid of an endowment for the Welsh church now in course of erection at A.," and a further bequest in trust, "to be applied in aid of erecting or of endowing an additional church at A." There was no additional church in the course of erection at A. at the date of the testatrix's will or death. *Held*, that the

bequest failed.—*Sinnett* v. *Herbert*, L. R. 12 Eq. 201.

4. A testator bequeathed all he should die possessed of to his two sisters, A. and S., to be invested as they should direct, A. to have the immediate control of her share, and S. upon attaining twenty-five, until which time in trust for her; and in case of the death of his sisters before the testator, or before marrying and having children of their own, the whole to the survivor. *Held*, that S. took a moiety absolutely on attaining twenty-five, and not subject to the additional contingency of marrying and having children.—*Clark* v. *Henry*, L. R. 6 Ch. 588; s. c. L. R. 11 Eq. 222.

See Devise; Partnership, 3; Will.

License.—See Covenant, 4.

Lien.—See Bill of Lading, 3; Bills and Notes.

Limitation.—See Lease.

Limitations, Statute of.—See Adverse Possession.

Luggage.

A passenger on a railway from Liverpool to London took with him a trunk containing six pairs of sheets, six pairs of blankets, and six quilts, for the use of his household when he should have provided himself with a home in London. The trunk was lost. *Held*, the above articles were not "ordinary luggage," and that the railway company was not liable for their value. The court (per Cockburn, C.J.), *held* "the true rule to be, that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage."—*Macrow* v. *Great Western Railway Co.*, L. R. 6 Q. B. 612.

Marriage Settlement.—See Settlement.

Marshalling Assets.—See Covenant, 1.

Misdescription.—See Insurance.

Misnomer.—See Insurance.

Mistake of Fact.—See Insurance.

Mortmain.—See Legacy, 3.

Mortgage.—See Power; Priority.

Motion.—See Costs.

Negligence.

By statute, gates must be maintained across a road on each side of a railway crossed by the road, and must be kept closed, "except during the time when horses, cattle, carts, or carriages, passing along the same shall have to cross such railway." The gates being open on one side of the railway, the plaintiff walked within them, and waiting for a train to pass, started to cross, when he was injured by another train. *Held* (Bramwell, J., dissenting), that there was evidence of negligence on the part of the railway company to go to the jury.—*Wanless* v. *North Eastern Railway*, 6 Q. B. (Ex. Ch.) 481.

See Inn-keeper.

Notice. — See Deed of Settlement; Lease; Priority.

Partnership.

1. A. and B. were partners. A debtor to the firm set off against his debt a private debt of B. to him, without A.'s knowledge or consent. A. filed a bill in equity against B. and the debtor to compel the latter to pay over A.'s share of the firm debt, without deducting the private debt of B. *Held*, that one partner had no authority to discharge a partnership debt by setting off his private debt against it; and that the debtor, knowing his own debt to be to a partnership, the bill was sustainable against him; and that as A. and B. would have to join as plaintiffs in a suit at law, the case was properly brought in equity.—*Piercy* v. *Fynney*, L. R. 12 Eq. 69.

2. One partner of a firm carried on business in Manchester, and the other in York, in each place under the name of "K. & Co." The former partner opened a bank account in Manchester in his own name, and when closed, the account showed a balance due to the bank. The balance had been used for partnership purposes. *Held*, that one partner had no authority to open a banking account on behalf of a firm in his own name, and that the York partner was not liable for the balance.—*Alliance Bank* v. *Kearsley*, L. R. 6 C. P. 433.

3. A testator gave to his wife his life-interest in a colliery in which he was a partner. By the deed of partnership, profits were to be added to the joint stock, or divided between the partners, or placed to their separate accounts on the books of the firm. For several years the profits were carried to the credit of a profit and loss account, after which subsequent profits were divided. At the testator's death there remained to the credit of the profit and loss account a large sum, most of which had been sunk in the colliery. *Held*, that the testator's share of the sum remaining to the credit of said account went to the remainder-men, not to the tenant for life.—*Straker* v. *Wilson*, L. R. 6 Ch. 503.

Peril of the Sea.—See Cargo.

Perpetuity.—See Legacy, 3.

Pleading.—See Error.

Pledge.—See Ultra Vires.

Possession.—See Adverse Possession.

Post-Office.—See Covenant, 4.

Powers.

Under a settlement power was given to lease premises for ninety nine years for the purpose of building or repairing buildings, and also power of sale or exchange, but no power was given to raise money by mortgage. A house on the premises became so ruinous from the foundation giving way, that it would have to be rebuilt on a new site. The court being satisfied that the value of the premises with a new house would not be less than the mere agricultural value if the house were pulled down and the material sold, authorized the house to be rebuilt with money raised by mortgage of the estate.—*Frith* v. *Cameron*, L. R. 12 Eq. 169.

Practice.—See Costs, 1.

Prescription.—See Easement.

Presentment.—See Bills and Notes, 1.

Principal and Agent.

1. A. and B. were cotton brokers, each acting for an undisclosed principal. A. bought cotton of B., making an over-payment by mistake. B. had made advances on the cotton to his principal, and subsequently set off the sum received from A. against these advances, and went on making further advances. *Held*, that B. did not, as a mere agent, receive the price from A., but as principal, and was liable to A. for the over-payment.—*Newall* v. *Tomlinson*, L. R. 6 C. P. 405.

2. The defendant authorized a broker to buy cotton for him, but declined to allow his name to appear. The broker offered to buy cotton of the plaintiff, but the latter refused to trust him, and he therefore gave the defendant's name. Bought and sold notes were exchanged, on which the broker was named as buyer. The plaintiff applied to the broker for payment, and not obtaining it, sued the defendant. *Held*, that the fact of the principal being known at the time of the contract, did not render evidence inadmissible to show that the contract was with him, though the broker's name only appeared in the bought and sold notes; and that neither the insertion of the broker's name in the notes, nor the request for payment, was a conclusive election to look to the broker only.—*Calder* v. *Dobell*, L. R. 6 C. P. (Ex. Ch.) 486.

See Adverse Possession; Attorney; Insurance; Partnership, 2.

Priority.

The owner of a term mortgaged the same, less two days, to A. He then created an equitable mortgage by way of second charge in favor of B. And last of all, he assigned the whole term by way of mortgage to C., who had notice of A.'s mortgage, but not of B.'s charge. *Held*, that the equities between B. and C. being equal, C.'s legal estate in the two days entitled him to priority.—*In re Russell Road Purchase Moneys*, L. R. 12 Eq. 78.

Profits.—See Partnership, 3.

Promissory Notes—See Bills and Notes.

Proof of Debt.—See Executors and Administrators.

Race.—See Gaming.

Railway.—See Luggage; Negligence; Receipt.

Ratification.—See Lease.

Receipt.

The plaintiff having been injured by an accident on the defendant railway, was offered and accepted a certain sum in full of all claims for his injuries, after first asking whether the receipt would prevent his recovering further if his injuries proved more severe than then supposed, and receiving an answer in the negative from the defendant's agent. The injuries proved more severe than supposed, the plaintiff brought an action, and the defendant set up the receipt in full. The plaintiff then filed a bill that the defendant be enjoined setting up such defence, but no fraud on the part of the defendant was alleged. *Held*, that the bill must be dismissed, as the plaintiff might rebut his receipt in an action at law.—*Lee* v. *Lancashire and Yorkshire Railway Co.*, L. R. 6 Ch. 527.

See Author.

Release.—See Receipt.

Religious Education.

A Roman Catholic died, leaving a widow who was a Protestant, and an infant six months old, who was baptized in the Catholic Church shortly before the father's death. The mother educated the child in the Protestant faith until arriving at the age of eight and a half years. The court ordered the child to be educated in the Roman Catholic faith, the religion of the father.—*Hawksworth* v. *Hawksworth*, L. R. 6 Ch. 539.

Remainder.—See Devise, 1, 3; Legacy, 1.

Remainder-man.—See Partnership, 3.

Rent-charge.—See Tillage.

Reservation.

Inclosure commissioners taking lands for inclosure, ordered, "That one-sixteenth part of value of the lands be allotted to the lords of the manor, &c., exclusively of their right and interest in the game." *Held*, that the right to take game in the whole of the lands inclosed

was reserved to the lords.—*Musgrave* v. *Forster*, L. R. 6 Q. B. 590.

Residuary Estate.—See Charity.

Riparian Rights.—See Easement.

River.

The Lord Chancellor *held* that the conservators of a river, appointed by Parliament, were the best judges of the necessary height of the water, and that evidence lessening the height they deemed necessary was of extremely little weight. — *Attorney-General* v. *Great Eastern Railway Co.*, L. R. 6 Ch. 572.

See Easement; Evidence.

Sale.

The plaintiff offered to sell to the defendant oats, exhibiting a sample. The defendant accepted the offer, believing the oats to be old, and paying a very high price for them if new; and the plaintiff, it seems, was aware of the defendant's mistaken belief. The defendant discovered the oats were new, and refused to complete the contract. *Held*, that passive acquiescence of the plaintiff in the self-deception of the defendant did not avoid the contract. Though the minds of the parties were not *ad idem* on the age of the oats, they were so as to the sale and purchase of them. It seems that if the plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats, the defendant would have been relieved from liability.—*Smith* v. *Hughes*, L. R. 6 Q. B. 579.

Salvage.

On appeal from the Admiralty Court, salvage for services under circumstances of great danger in saving a ship and cargo, valued at £46,000, were increased from £1,000 to £2,000. —*Arno'd* v. *Cowie* (The Glenduror), L. R. 3 P. C. 589.

See Cargo; Insurance.

Seal.

A commission was issued for taking the acknowledgment of a deed at Melbourne. The deed when sent out had pieces of green ribbon attached to the places where the seals should be, but no wax. The deed was returned in the same state, properly attested as "sealed," &c. *Held*, that there was sufficient *primâ facie* evidence that the deed was sealed at the time of its execution.—*In re Sandilands*, L. R. 6 C. P. 411.

See Covenant, 1; Lease.

Security.—See Bills and Notes, 3; Executors and Administrators.

Set-off.

1. A county treasurer kept with a bank an account headed "Police Account," and also his private account. He overdrew his private account, and paid the sums so obtained to the credit of the police account, and subsequently became bankrupt. There stood to his credit in the police account a large sum, somewhat exceeding the amount due thereon from him to the county, and about equal to his indebtedness to the bank on his private account. *Held*, that the bank could not set off the two accounts, and that the balance due on the police account belonged to the county.—*Ex parte Kingston*, L. R. 6 Ch. 632.

2. Action for improper performance of contract. Defence that the defendant had brought action for price of work under said contract, and had recovered the whole amount, no evidence of said improper performance having been offered. *Held*, that the plaintiff was not bound to offer said evidence to effect a set-off, but might bring the present cross-action.—*Davis* v. *Hedges*, L. R. 6 Q. B. 687.

See Partnership, 1.

Settlement.

1. Where a party made a voluntary settlement, and nine months afterward was insolvent, the burden of proof was held to be on him to show his solvency at the date of the settlement.—*Crossley* v. *Elworthy*, L. R. 12 Eq. 158.

2. By settlement a husband's real estate was limited to his first and other sons successively in tail male. The wife's estate was limited to the sons and daughters "other than the eldest or only son," as tenants in common in tail. A third son succeeded to the father's estate, and the former's son claimed a share with the daughters in the wife's estate. *Held*, that "eldest son" meant eldest son taking the father's estate, and that said son of the third son was entitled to no interest in the wife's estate.—*In re Bayley's Settlement*, L. R. 6 Ch. 590.

3. By marriage articles a father covenanted with his daughter's husband to settle property at his death upon the husband and wife during their respective lives, and after their death to their issue. The husband covenanted to settle his property upon like trusts. The wife died without issue, and the father died, directing his executors to pay whatever might be due under the marriage articles. The husband had never performed his covenant, and claimed a life interest in his wife's father's property. *Held*, that the performance of his covenant by the husband was not a condition precedent to his claim against said father's property, and the claim was allowed.—*Jeston* v. *Key*, L. R. 6 Ch. 610.

See Power.

Ship.—See Bills and Notes; Freight.

Specialty Debt.—See Covenant, 1, 2.

Specific Performance.—See Covenant, 1; Lease.

Statute.—See Company; Construction; Gaming; Hackney Carriage; Negligence; Reservation.

Statute of Frauds.—See Principal and Agent, 2.

Statute of Limitations.—See Adverse Possession.

Tax.

By statute, the "occupier of land covered with water" pays a certain sewer rate. The appellant possessed a canal; land occupied by filter beds and appurtenances for filtering water; land adjoining used for preparing sand for filter beds; and last, land, part of public roads, footpaths, and other ways occupied by iron pipes, mains, and sewer pipes. *Held*, that the canal and filter beds should pay said rate, but not the two latter parcels of land.—*East London Waterworks Co.* v. *Leyton Sewer Authority*, L. R. 6 Q. B. 669.

Tenant for Life.—See Costs, 1; Partnership, 3.

Tenant in Tail.—See Adverse Possession.

Term.—See Priority.

Tillage.

In case any part of certain land was converted into "tillage," a tithe rent charge became due. The owner of the land built a house thereon, and converted a part into garden ground, the remainder being orchard. *Held*, that the land was not converted into tillage, which is land used for agricultural purposes.—*Vigar* v. *Dudman*, L. R. 6 C. P. 470.

Tithe.—See Tillage.

Title.—See Adverse Possession; Devise, 1.

Trover.—See Ultra Vires.

Trust.—See Devise, 2.

Trustee.—See Bills and Notes, 2, 3; Company, 1; Costs, 1.

Ultra Vires.

By a bank charter it was declared not lawful for the bank to lend or advance money on the security of merchandise. The bank advanced money upon a pledge of wool. *Held*, that whether the above provision was violated or not, the right of property and possession passed to the bank, which could maintain trover for the conversion of the wool.—*Ayers* v. *South Australian Banking Co.*, L.R. 3 P.C. 548.

Voluntary Settlement.—See Settlement, 1.

Wager.—See Gaming.

Warranty.—See Sale.

Water-course.

The plaintiff's stream was supplied in part by underground springs, which the defendant drew off by his drain. *Held*, that if the defendant could not get at his underground water without touching water in a defined surface channel, he could not get it at all, and the defendant was enjoined drawing water from the stream.—*Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483.

See Easement.

Water Rate.—See Tax.

Will.

1. A testator, in the presence of witnesses, wrote his will on the second and third sides of a sheet of note paper, the attestation clause and signature of said witnesses being on the back, or first and fourth pages. *Held*, that the will was well executed under 15 & 16 Vict. c. 24.—*In the Goods of Archer*, L.R. 2 P. & D. 252.

2. A testator struck his pencil through certain paragraphs of his will and wrote his initials opposite, and opposite other paragraphs he put a query. Afterward he executed a codicil confirming, so far as it did not alter, the will. *Held*, that the will must be admitted to probate without the pencil alterations.—*In the Goods of Hall*, L. R. 2 P. & D. 256.

See Charity; Costs, 3; Devise; Executors and Administrators; Legacy; Partnership, 3.

Winding-up.

See Company.

Words.

"*Dead Freight.*"—See Bill of Lading; Freight, 6 Am. Law Rev. 89.

"*Debt payable on a contingency.*"—See Bankruptcy, 2.

"*Exclusively.*"—See Reservation.

"*Frontage.*"—See Lease.

"*Land covered with water.*"—See Tax.

"*Liability to pay money upon a contingency.*"—See Bankruptcy, 2.

"*Plying for Hire.*"—See Hackney Carriage.

"*Put in force.*"—See Execution.

"*Specifically.*"—See Devise, 4.

"*Tillage.*"—See Tillage.

REVIEWS.

The London, Edinburgh, British Quarterly and Westminster Reviews. New York: Leonard Scott & Co. Toronto: Copp, Clark & Co. January, 1872.

The contents of the great British Quarterlies are to those of the general run of the current popular periodicals, pretty much what good bread and beef are to sponge cakes and whipped cream. They eschew novels and sensationalism in all its forms, and afford recreation as well as instruction in the discussion, under the form of reviews, of such

works in literature and science as seem most worthy of being brought under the notice of the public.

Representing the great political parties in the state, as well as the principal school of religious and scientific thought, they shew the progress of each in their respective spheres, and their views and opinions on the social and political questions of the day, as set forth by their ablest champions. They are of value therefore rather to the student than to the mere reader who wishes to wile away an idle hour. To the former they will, in a condensed form, give a mass of information on many subjects to which he otherwise would have no access, and will inform him of the views held with regard to them by men, who have both the time and material for their elucidation, which he from circumstances does not possess. Of the two numbers before us, the *British Quarterly* is the more interesting to the general reader, being rather less scientific than the others and chiefly filled with reviews of historical works. Among them is a very good paper on "The Speaker's Commentary," to which illusion is so frequently made, though few have yet seen the work itself. "An English Interior in the Seventeenth Century" is very interesting. "Mahomet" is the title of a critique on a very remarkable work, viz.: "A series of Essays on the Life of Mahomet," written by Khan Bahador, a lineal descendant of the Prophet and a professor of his religion, who is withal a Knight of the English Order of the Star of India, and who does not fear in defence of his religion to meet "either Christian divines or European scholars on their own ground."

The contents of the *Westminster* are chiefly political and scientific. Among the subjects discussed are, "The Political Disabilities of Women," — "The Development of Belief,"— and "A Theory of Wages." Among the lighter articles is an interesting sketch of the "Life of the first Earl of Shaftesbury."

Of the articles in the *Edinburgh*, we notice especially "Yeale's Edition of the Travels of Marco Polo,"—"Lace Making as a Fine Art," — "Tyerman's Life of John Wesley," — "Railway Organization in the late War."

Blackwood's Magazine for March

Is an unusually attractive number, and contains an eloquent and probably not an exaggerated sketch of the Life of General Lee, the greatest General that ever trod this continent and perhaps the third in rank of all modern Generals. There is also a paper by Cornelius O'Dowd, entitled "The American Revoke," and many other interesting articles all in the true Blackwood style. This number is of peculiar interest to readers here at the present moment. It has been republished very early by the Leonard Scott Publishing Company of New York. The following are the contents in full: — "A True Reformer"— "Voltaire"— Maid of Sker, Part viii"—"Autumnal Manœuvres"—"The Manchester Nonconformists and Political Philosophy"—"General Lee"— "Cornelius O'Dowd (The American 'Revoke')" —"Ministers before Parliament"

American Law Review. January, 1872. Little, Brown & Co., Boston, U.S. Quarterly, $5 per annum.

The above number contains articles principally of interest to the people and lawyers of the United States. The usual digest of English Law Reports is given (which we again make use of), also a Selected Digest of State Reports, list of law books published in England and America since October 1871, Summary of Digest, &c.

The April number is also received, and will be noticed hereafter.

Wood's Household Magazine. March, 1872. S. S. Wood & Co., Newburgh, N. Y.

This periodical, now in its tenth year, has with the present issue passed into the hands of the well known Gail Hamilton, as editor-in chief. With a frankness characteristic of her sex and country, this lady lets us know that her income exceeds $3,000 a year, that she means to make money for the proprietors, that she has secured, as contributors, such writers as Greeley, Portus, Beecher and Saxe, and that for a dollar per year the whole can be secured. Taking the average run of readers, something can be found in this magazine suitable for everybody, so diversified are its contents. We have found the stories not to be of that livid kind which induce nightmare and dyspepsia, but rather gentle sedatives, well adapted after a course of legal reading to tone the nervous system down to balmy sleep.

DIARY FOR MAY.

1. Wed.. *Philip & James.* County Treasurer to make up books, enter arrears, and make yearly settlement.
4. Sat... Articles, &c., to be left with Secretary of Law Society.
5. SUN. *Rogation.*
9. Thur. *Ascension.*
12. SUN. *1st Sunday after Ascension.*
16. Thur. Exm. of Law Stud. for call to Bar with Honors.
17. Fri .. Exam. of Law Students for call to the Bar.
18. Sat.. Exam. of Art. Clerks for certificates of fitness.
19. SUN. *Whit Sunday.*
20. Mon. Easter Term begins. Articled Clerks going up for inter-exam. to file certificates.
23. Thur. Inter-exam. of Law Students and Articled Clerks.
24. Fri.. Paper Day, Q.B. New Trial Day, C.P.
25. Sat.. Paper Day, C.P. New Trial Day, Q.B.
26. SUN. *Trinity Sunday.*
27. Mon. Paper Day, Q.B. New Trial Day, C.P.
28. Tues. Paper Day, C.P. New Trial Day, Q.B.
29. Wed. Paper Day, Q.B. New Trial Day, C.P.
30. Thur. Paper Day, C.P. Open Day, Q.B.
31. Fri.. New Trial Day, Q.B Open Day, C.P.

THE

Canada Law Journal.

MAY, 1872.

Mrs. Bradwell, the Editor of the *Chicago Legal News*, is one of the most indefatigable of her sex. She applied for admission to the Bar of Illinois; and on being refused, moved all the Courts of the State, from the lowest even unto the highest. But the law was against her, and, cherishing the motto of her paper, "*Lex vincit*," she submitted with serene grace. But it was only to gather up her energies for a new and now successful effort. The Senate of the State of Illinois has been moved, and the result is announced in her paper in jubilant capitals: "Liberty of Pursuit triumphant in Illinois!" Her importunity has secured the passage of an Act, which takes effect next July, and reads as follows:

"Sec. 1.—No person shall be precluded or debarred from any occupation, profession or employment (except military), on account of sex. Provided, that this Act shall not be construed to affect the eligibility of any person to an elective office.

"Sec. 2.—All laws inconsistent with this Act are hereby repealed.

"Sec. 3.—Nothing in this Act shall be construed as requiring any female to work on streets or roads, or serve on juries."

We think this indomitable woman, or "female," as the Act has put it, is now entitled to change the motto of her journal into "*Sex vincit.*" If we may judge from the character of her paper (one of the most spirited of our weekly exchanges), she will, as a barrister, surpass many of her bearded brethren; and in time, we doubt not, should the gown movement obtain among the United States bar, she will arrive at the forensic honour of being "clad in silk attire." We notice that in the Washington District Courts a "female lawyer, coloured," has already been admitted to practice.

These are the halcyon hours of legal authors. Times are changed from the days when counsel were sternly reprimanded if they ventured to cite text-writers. Treatises even so weighty as Viner's Abridgement were once lightly esteemed by the court. In *Farr* v. *Dean* (1 Burr. 364), Mr. Justice Foster interrupted Sergeant Martin, when he was clenching an argument, thus: "Brother, Viner is not an authority. Cite the cases that Viner quotes; that you may do."

Notwithstanding the complacency with which the Judges now take a note of the text-writers cited, it remained for a Western Supreme Court (as duly chronicled in the *Chicago Legal News*) to render the finest compliment ever yet conceived by judicial intellect to legal authorship. That Court, it appears, suspended giving judgment in an important testamentary case, until Mr. Kerr's recent treatise on "Fraud and Mistake" could be imported from England, and placed in the hands of the Judges.

Since the four-and-twenty-day deliverance of the Attorney-General against the historical "claimant," minute statisticians have been overhauling the records of legal speeches famous for their "long, majestic march," if not for their "energy divine." The closest upon Sir John's heels was Miss Shedden, who, in the great Legitimacy case which so nearly concerned her, spoke for twenty-four days before the astonished and despairing law lords. Sir Charles Wetherell is said to have occupied eighteen days in discussing a cause in Chancery. In *Small* v. *Attwood*, the House of Lords listened for twelve days to the compact eloquence of Sergeant Wilde (afterwards Lord Chancellor Truro), whose fee, by the way, was £6,000—about the same sum as that

which now ministers to the solace of Sir John Coleridge.

STRICTURES FROM THE BENCH.

Judges after all are only human beings, notwithstanding the majesty with which their office is invested, and which to a limited extent attaches to their persons; and the amount of awe which they inspire varies, more or less, according to the bump of reverence which each individual among their possible subjects possesses.

Probably it is something akin to this very proper feeling of respect for their office, if not for their persons, which makes it so refreshing to hear their observations, not unfrequently called forth, on the alleged short-comings or stupidity of the Bar, or even of their brethern on the Bench. That they do break out occasionally in righteous wrath at some of the proceedings or omissions of judicial officers over whom they have an appellate jurisdiction, when utter carelessness or incompetence is the cause of the difficulty, is not to be wondered at. For example, some of our County Judges would appear to have a very hazy idea of their duties in taking down notes of evidence, &c., at trials, a most important matter when it is remembered that their rulings are liable to be called in question at any moment by a Superior Court. We happen to have before us two reported cases in the Common Pleas, where the Court makes some very plain observations on this point. In *Arthur* v. *Monck*, 21 C. P., at page 83, the learned Chief Justice expresses "great regret at being compelled to mention the very great difficulty, I might almost say impossibility, which the Court feels in trying to deal properly with a case sent up to us as this has been. We cannot, of course, dictate any particular mode either in trying cases or charging juries, or dealing with objections or reported cases: we must content ourselves with expressing our painful sense of our inability to perform the duty cast upon us by the Legislature, as a Court of Appeal from the County Courts, if the latter tribunals do not place before us fuller and more complete and satisfactory reports of all that took place before them."

The habit of this County Court Judge in this respect would seem to be inveterate, for we hear in *Ainslie* v. *Ray* (reported on page 152 of the same volume), the despairing accents of the Court in their almost impossible endeavour to do justice between the parties for the same cause, in the words of Mr. Justice Gwynne, who said: "This is *another* of those appeals from the County of Kent in which we are not informed how the learned Judge charged the jury, although it *does* appear that defendant's counsel *did* make some exceptions, but what they were is not stated." The italics are ours, but we can fancy they very faintly represent the accentuation of the sentence as read by that learned Judge, whose most expressive and earnest manner of reading his judgments is so highly appreciated at the Bar.

Some of our readers may deem these observations of the Common Law Judges too severe. If so, let us confirm them by the remarks made in Equity. Even the mild flow of Chancery procedure is disturbed by the strange doings of an occasional County Judge.

It is said that "If a judge is just, a chancellor is juster still,"—and we suppose a vice-chancellor must be about as just as a chancellor. Take, then, the language of V. C. Strong, in *Northwood* v. *Keating*, 18 Gr. p. 670, where, upon its appearing that the same County Judge had taken upon him to insert something in the certificate endorsed upon the deed of a married woman, after he had signed it, the Court is provoked into saying, "No doubt it was a very irregular and improper thing to have done."

It is, however, from the Bench in England that compliments of this kind fly most freely, and sometimes apparently without the good cause shewn in the extracts given above. We do certainly see, once in a way, in this country, a sentence like the following, which we extract from the judgment of the Court in *Nicholls* v. *Nordheimer*, 22 C. P. 57, on an appeal from the decisions of another County Court Judge:—"On the merits there was enough, possibly, to prevent a non-suit. We can hardly, however, understand any intelligent jury, not to say a Judge, accustomed to criticise evidence, finding for the plaintiff." But it takes an English Judge to express his opinion freely of a brother Judge's view of the law in a case on appeal. There is no beating about the bush to find a polite form of words wherein to express the contempt the one entertains for the opinion of the other; but there is a plain declaration that some opinion

delivered by a judge perhaps of quite as high standing as the speaker is too absurd even for argument, or that such and such a statement is contrary to the first principles of law, or impossible to be sustained on any ground, whatever, &c.

When the Bench "pitches into" each other in this internecine manner, each accepting the chastisement, by the way, in apparently the most amiable and unconcerned manner, hoping, we presume, to take it out of some one else in the same fashion, on the first opportunity, it could not be expected that the Bar would escape. An amusing example of this may be seen in *Hunter* v. *Walters*, 25 L. T., N.S., 769, where Lord Justice James says:—"This case appears to have been argued upon five days before the Vice-Chancellor; it has occupied the whole of one day and a great part of another day before us. I am, however, of opinion that it is one of the simplest and plainest cases that was ever presented to a Court of Equity."—We may mention, *en passant*, that the Vice-Chancellor was Malins, V. C., and, strange to say, his decision was upheld; and we say strange, because the Lords Justices would seem to think it their principal mission, in a general way, to reverse his decisions; probably the appellant thought, under these circumstances, that the chances of success were in his favor, and so thought he would risk the appeal. Lord Justice James, who seems to have been in rather an amiable frame of mind on this occasion, continues:—"To my mind it is almost ludicrous to contend, and it would be most dangerous to hold, that, &c.," and then waxing very severe, he winds up thus—"It appears to me that the proper place for such an argument as that would be in some new satirical work—some new Martinus Scriblerus, or Gulliver's Brobdignag, ridiculing, by clever exaggeration, the doctrines of the Court of Equity with respect to constructive notice." We might refer also to the remarks of the Chancellor, *post* p. 110. But now leaving the topics we have above briefly referred to, and turning to the question of constructive notice in connection with these observations of the learned Lord Justice, while we are quite willing that he should pour out the vials of his wrath on the learned and devoted head of the eminent Q. C. who led for the appellants, we must protest against the idea that any "clever exaggeration" of the doctrine of constructive notice could be considered as too tough for the stomach of a Court of Equity to digest.

JUDICIAL APPOINTMENTS.

The appointment of Sir Robert Collier to a vacant judgeship in the Common Pleas in England, for the mere purpose of making him eligible as one of the four paid members of the Judicial Committee of the Privy Council, has been discussed *ad nauseam;* we do not, therefore, propose to add anything to what has already been said, so much better than we could say it, in the English law periodicals on this subject. It may be well, however, to record for future reference the admirable protest of the Lord Chief Justice of England against the high-handed act of Mr. Gladstone and his Chancellor, which was, in the words of Sir Alexander Cockburn, "at once a violation of the spirit of the Act of Parliament, and a degradation of the judicial office." And in connection with this proceeding, we may refer briefly to some other matters of a kindred nature.

The following is the text of the letter addressed on the 10th November, 1871, to Mr. Gladstone, by the Chief Justice:—

"Dear Mr. Gladstone,—

"It is universally believed that the appointment of Sir Robert Collier to the seat in the Court of Common Pleas, vacated by Mr. Justice Montagu Smith, has been made, not with a view to the discharge of the duties of a judge of that court, but simply to qualify the late Attorney-General for a seat in the Judicial Committee of the Privy Council, under the recent Act of the 34 & 35 Vict. c. 91.

"I feel warranted in assuming the general belief to which I have referred to be well founded, from the fact that the Lord Chancellor, with a view to contemplated changes in our judicial system, has, notwithstanding my earnest remonstrance, declined for the last two years to fill up the vacant judgeship in the Court of Queen's Bench. I cannot suppose that the Lord Chancellor would fill up the number of the judges of the Court of Common Pleas, while to the great inconvenience of the suitors and the public, the number of the judges of the Queen's Bench is kept incomplete.

"I assume, therefore, that the announcement in the public papers, which has so startled and astounded the legal profession, is true; and, this being so, I feel myself called upon, both as the

head of the common law of England, and as a member of the Judicial Committee of the Privy Council, to beg you, if not too late, to reconsider any decision that may have been come to in this matter; or, at all events, to record my emphatic protest against the course proposed—as a judge, because a colourable appointment to a judgeship for the purpose of evading the law appears to me most seriously to compromose the dignity of the judicial office—as a member of the judicial committee, because, while grave doubts as to the legality of the appointment are entertained in many quarters, none seem to exist as to its grievous impropriety as a mere subterfuge and evasion of the statute.

"The statute in question, the 34 & 35 Vict. c. 91, contains in the first section the following enactment: 'Any persons appointed to act under the provisions of this Act as members of the said Judicial Committee must be specially qualified as follows—that is to say, must at the date of their appointment be, or have been, judges of one of Her Majesty's Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature, at Fort William in Bengal, or Madras, or Bombay, or of the late Supreme Court of Judicature in Bengal.'

"Now, the meaning of the Legislature in passing this enactment is plain and unmistakable. It was intended to secure in the constitution of the high appellate tribunal, by which appeals, many of them in cases of vast importance, from our Indian possessions as well as from the rest of our colonial empire, are to be finally decided, the appointment of persons who had already held judicial office as judges of the Superior Courts. Whether wisely or unwisely, it plainly was not intended that the selection might be made from the Bar. It was to be confined to those who were, or had been, judges, and who, in the actual and practical exercise of judicial functions had acquired and given proof of learning, knowledge, experience, and the other qualifications which constitute judicial excellence. No exception in this respect is made in favour of an Attorney-General or other law officer of the Crown, who, however eminent and distinguished their position, of course remain members of the Bar. Nothing could have been easier, had it been intended to make such an exception, than to have included the law officers of the Crown among the persons specified as eligible. But the eligibility of the law officers does not even appear to have been contemplated by the Government in passing the present Act, a provision enabling the appointment to the Judicial Committee to be made from the Bar, contained in the Bill of the previous year, having been, I presume purposely, omitted from the Bill as introduced in the last session. It is, however, unnecessary to dwell further on this point. No one will be found to say that it was intended to make a law officer, as such, eligible under this Act.

"It being, then plain that the intention of the Legislature was that the selection should be made from the judges, I cannot shut my eyes to the fact that the appointmnt of the Attorney-General, who, as such, was not qualified under the Statute, to a judgeship (the functions of which he is not intended to discharge) in order that he may thus become qualified according to the letter of the Act, cannot be looked upon otherwise than as colourable, as an evasion of the statute, and a palpable violation, if not of its letter, at all events of its spirit and meaning. I cannot help thinking of what would have been the language in which the Court of Queen's Bench would have expressed its opinion if such an evasion of a statute had been attempted for the purpose of qualifying an individual for a municipal office, and the case had been brought before it on an information in the nature of *quo warranto*. In the present instance, the Legislature, having settled the qualification for the newly-created office, momentarily to invest a party otherwise not qualified with a qualifying office, not that he shall hold the latter, but that he may be immediately transferred to the former, appears to me, I am bound to say, to be nothing less than the manufacture of a qualification, not very dissimilar in character to the manufacture of qualifications such as we have known practised in other instances in order to evade the law. Forgive me, I pray you, if I ask you to consider whether such a proceeding should be resorted to in a matter intimately connected with the administration of justice in its highest departments.

"It would obviously afford no answer to the objection to the proposed appointment to say that a gentleman who has held the position of a law officer of the Crown must be taken to be qualified to fill any judicial office, however high or important. This might have been a cogent argument to induce the Legislature to include the Attorney-General among the persons 'specially qualified' under the Act; but it can afford no justification for having recourse to what cannot be regarded as anything better than a contrivance to evade the stringency of the statute as it stands. The section in question makes the office of an Indian chief justice a qualification for an appointment to the Judicial Committee. Suppose that, as might easily have happened, an Indian chief justiceship had chanced to be vacant. An attorney-general would, of course, be perfectly qualified for the office. What would have been said if the

Attorney-General had been appointed to such a chief justiceship, not with the intention of his proceeding to India to fill the office, but simply for the purpose of his becoming qualified, according to the letter of the statute, for an appointment to the Judicial Committee? What an outcry would have been raised at so palpable an evasion of the Act! But what possible difference, allow me to ask, can there be, in principle, between such an appointment as the one I have just referred to, and an appointment to a judgeship in the Court of Common Pleas, the duties of which it is not intended shall be discharged, for the sole purpose of creating a qualification in a person not otherwise qualified? I cannot refrain from submitting to you that such a proceeding is at once a violation of the spirit of the Act of Parliament and a degradation of the judicial office.

"I ought to add, that from every member of the legal profession with whom I have been brought into contact in the course of the last few days, I have met with but one expression of opinion as to the proposed step—an opinion, to use the mildest terms I can select, of strong and unqualified condemnation. Such, I can take upon myself to say, is the unanimous opinion of the profession. I have never in my time known of so strong an expression, I had almost said explosion of opinion.

"Under these circumstances, I feel myself justified, as Chief Justice of England, in conveying to you what I know to be the opinion of the profession at large, an opinion in which I entirely concur. I feel it to be a duty, not only to the profession, but to the Government itself, to protest—I hope before it is too late—against a step—as to the legality of which I abstain from expressing any opinion, lest I should be called upon to pronounce upon it in my judicial capacity—but the impropriety of which, for the reason I have given, is to my mind strikingly and painfully apparent.

"I beg you to believe that I make these observations in no unfriendly spirit, but from a sense of duty only. I should sincerely rejoice at the promotion of an Attorney-General who has filled his high office with dignity and honour; but in the position I occupy I feel I ought not to stand by, and, without observation or objection, allow a judicial appointment to be made, which from the peculiar circumstances under which it will take place, is open to such serious objection, and which, as I have abundant reason to believe, will be the subject of universal condemation and regret.—I beg to remain, very faithfully yours,

"A. E. Cockburn"

To this letter Mr. Gladstone made a curt reply, and handed the matter over to the Lord Chancellor (Hatherley), whose letter to the Chief Justice was only remarkable for its insolent tone and evident desire to burke the question, and snub, not only the Chief Justice, but the whole Bar of England, who in this matter have loudly and unmistakably condemned the unwarrantable action of the Government.

Of course, as all our readers are aware, the whole affair was brought before the House of Commons, by Mr. Cross moving a vote of censure on the appointment of Sir R. Collier, declaring that it was a violation of the intention of the statute and an evil example in the administration of judicial patronage. Many strong supporters of the Government, and prominently so, Mr. Denman, spoke and voted in favor of this motion, which, however, was lost; but the very small majority in favor of the Government—27 in a House of 513—was in itself tantamount to a very strong expression of censure, and we presume will be so accepted by the Chancellor, as it certainly has been by outsiders, and will be so looked upon by historians.

The *Law Times* thus speaks of the discussion in the House:—

"To us the general results of the debate appear satisfactory, for they show that we still have very many able public men, who will neither sanction nor tolerate an evasion of the law by any Government, whatever its party may be: but, on the other hand, it is by no means reassuring to find the Prime Minister and the Lord Chancellor, after several months of cool reflection, after hearing the most invincible arguments against their view of the construction of the Act of Parliament, come forward and continue to maintain that view by arguments that show a sort of incapacity on their part to understand the distinction between an evasion of, and a full compliance with, the provisions of an Act of Parliament. It is a remarkable fact that neither of the present law officers of the Crown approve of the construction put upon the Act, for we may fairly presume that if they did they would have come forward and said so, and the Government failed to obtain the support of any lawyer of repute in either house except Sir Roundell Palmer, who made a speech for them that was a model of forensic ingenuity, and a perfect epitome of all the fallacies known to logicians; but notwithstanding all this, neither Mr. Gladstone nor the Lord Chancellor said a word that could be construed to mean that they would not pursue exactly the

same course as before if the thing had to be done over again. * * * * *

"The answer to these grave charges, so far as they were answered at all, is to be found in the speeches of Mr. Gladstone, the Lord Chancellor and Sir Roundell Palmer, and we have every wish to do justice to their arguments and views. The propositions on which the arguments of Sir R. Palmer and the Lord Chancellor were based, as far as we can understand them, were two. First, that the Act does not specify any definite period of judicial experience, therefore the Act is satisfied by appointing a person who has the name or status of a Judge when the appointment is made, whenever or however that name may have been bestowed; secondly, that Sir R. Collier was a fit and proper person to be made a Judge of the Court of Common Pleas, and therefore there could be no objection to give him that Judgeship as a qualification for the Judicial Committee. With regard to the first of these propositions its advocates evidently shrunk from the consequences it would lead to, and Sir R. Palmer abandoned his whole position in two several parts of his speech when he observed, 'now if this thing were done wantonly, maliciously, or without a *bonâ fide* view to serve the public, or if it were done over and over again, as the honourable gentleman suggested, I should not stand here to defend it;' and again, in reference to a remark previously made with regard to the Indian qualification, he said, 'I think it would have been improper, though it might have been legal, to appoint to the Judicial Committee any person who was not really and truly such an Indian chief judge as to be in that respect a fit representative on the Judicial Committee of the Indian Judicature.' But really to a lawyer, at least, it is hardly necessary to do more than state the first proposition in order to show its absurdity. The Act obviously provides, if its limitations are to be more than a mere nullity, that the person selected for the Judicial Committee shall be, when the selection is made, a Judge, or *ex*-Judge, not that he may be made a Judge after he has been selected to become a member of the Judicial Committee. As to the second proposition it has really nothing to do with the matter. Sir R. Collier may morally and intellectually be the fittest man in the world to put in the Judicial Committee, but he certainly was not legally fitted for it, unless when selected for the appointment he had *bona fide* the qualification required by the Act. As to the views of Mr. Gladstone, who seems to have been the prime mover in the whole affair, we have some difficulty in understanding what his precise construction of the Act is. One part of his speech almost conveys the impression that he reads the qualification required by the Act not as literally meaning that the appointment should only be given to a Judge or ex-Judge, but as a sort of figurative way of saying that the person appointed should be of a certain standard of fitness and capacity, and upon this view of the Act it would not have been necessary to pass Sir Robert Collier through the Common Pleas at all, before installing him on the Judicial Committee. From the speech, as a whole, we regret to gather, notwithstanding some fine flourishes in it, that Mr. Gladstone is much more concerned about having raised a storm in the House, than having evaded the plain meaning of an Act of Parliament, and we still more regret the tone in which he, as well as the Lord Chancellor, alludes to the Judges. Mr. Denman said in the course of the debate, and we think truly, 'that there was a desire to do something to render our courts less independent, to place them on a lower basis, to prevent them being able to stand between the Crown and the subject, between the Government of the day, or a popular majority in the House of Commons, and the rights of the individual subject, and that there was a disposition on the part of persons now high in authority to destroy some of the securities which we possessed for the independence and high character of our courts of justice.' These remarks we think were fully justified by much that was said on Monday night, and by what fell from the Lord Chancellor on the previous Thursday, when the extraordinary avowal was made that a gentleman had been made a County Court Judge in order that 'he should be restored to competence.' If these are the principles upon which judicial appointments are to be made, and if Judges are to be attacked with sneers and insults whenever they lack subservience to the Government of the day, we fear there is a gloomy future before the bench of England. And we venture to predict that regard for the law will not long survive the decay, if it once sets in, of that feeling of honour and respect in which those who administer it have hitherto been held."

The remark about the County Court Judge refers to the appointment of Mr. Beales, of which the *Law Times* speaks after this fashion:—

"One of the several remarkable theories concerning judicial appointments propounded by the present Government, is that to which, according to Lord Hatherley, the County Court Bench is indebted for the acquisition of Mr. Beales. That learned Judge was deprived of a revising barristership by Chief Justice Erle, on the ground that,

by active political agitation, he had disqualified himself for the office, which is one, of course, intimately connected with political matters. Deeming him an injured man, Lord Hatherley makes him a County Court Judge. This is the ostensible reason for an appointment which at the time we condemned most emphatically, disregarding altogether the question of personal merit; but we confess we should not be inclined to go into other motives which *may* have influenced the Government. We now simply desire to record our most energetic protest against County Court Judgeships being used as crumbs of comfort for hardly used barristers."

We heartily concur in this protest, and add to it the further protest, that no appointment to a judicial office, or to any ministerial office, where professional competence or eminence is required, should be made merely to meet the exigencies of party politics. If, however, this must be (though the confession even of the alleged necessity of this is degrading), let the best men be chosen from the political supporters of the Government which may have the patronage to bestow. As a mere question of party politics, it may well be argued that any other course is suicidal in the long run. But we should endeavour to reach the highest standard in such a vital matter as this, and make the selection from the profession as a whole, irrespective of party or personal considerations, throwing aside all questions of political exigency or personal feeling.

Entirely apart from party politics, it may be that the fall of the Gladstone Ministry, rumours of which are afloat, will not be an unmixed evil, in view of the course taken by them in matters pertaining to the Judiciary. Mr. Gladstone and Lord Hatherley have shown themselves incapable of appreciating the high ground that has hitherto been taken in this respect by British statesmen. The motives for, and the method of appointment to judicial positions, should be pure and unassailable, as well as the appointment itself unobjectionable.

Let it not be said of us in this Province, as is said of the Bench in the Province of Quebec (we quote from *La Revue Critique*):—

"Seats on the bench are amongst the prizes offered by political rings for uncompromising support; and it makes very little matter whether *rouge* or *bleu* be in the ascendant, the same principle is acted on by both parties, and generally judgeships are conferred, not on account of fitness for the office, but because it is necessary to provide for a member of the party in power. The system is radically bad; for in lieu of good lawyers, worn-out politicians are placed on the bench. If a man is a political failure, *presto* he is made judge; so that there is a very fair chance of the Bench becoming the recepticle for that favoured class of the community which, fifty years ago, in England, was said to monopolize the Church. Thanks to the system, the Bench of Quebec does not command the respect which is accorded to persons occupying judicial positions in other countries."

The writer of the above article then goes on to suggest a mode of appointment which would secure better men, very properly premising his observations by advocating an increase of salary to Judges. We give his views for what they are worth. We express no opinion as to the advisability of the course advocated: it is scarcely worth while to discuss it, there being no chance of the suggestion being carried out in these days. He says:

"In England it has been proposed to vest the right of nominating the judges in the Lord Chancellor and Chief Justices. Here it may perhaps be permitted to advocate a still greater departure from old principles.

"Who, may it be asked, have a greater interest in securing the appointment of a fit person to be a judge than the Bar and the Bench of the district within which such judge, after his appointment, is to act? Where can there be found persons better qualified to judge of a person's fitness for a seat upon the bench than those who plead against him and those who hear him plead, nearly every day of their lives. Taking, then, the opportunities possessed of judging fairly, considering also their interest in choosing the most fit and proper person for the office, it must be admitted that the Bar and the Bench of the district in which a man practises his profession, should be the best judges of his fitness for promotion to the bench."

The Tichborne case is still occupying the public mind in England to a great extent. The Attorney-General stated in the House of Commons the other day that six counsel, led by himself, were to conduct the criminal case against the claimant. Lively times may be expected at the Old Bailey if the defence fund is well sustained.

SELECTIONS.

RAILWAY GRANTS.

The construction of railroads as aids to the settlement of our public lands is an enterprise of the highest national importance, and as such ought to receive from the community and from the Government all the assistance which they can command. Every person must have seen with satisfaction the liberality with which our rural and urban municipalities have subscribed to the stock of the various companies now in process of organization or which are already pushing on the construction of new lines. The Provincial Legislature have resolved to insure the success of these enterprises by granting to them large tracts of the public lands. Are these grants constitutional? Such is the question to which the writer purposes to draw public attention. This point of constitutional law would have been raised more opportunely before the incorporation of these companies; but it cannot be denied, even at the present time, that it is one of great practical importance. If the success of the present railway movement depends in great measure on the grant of those public lands; if the money votes of the municipalities have been given on the faith of these grants, it becomes necessary to ascertain that their legality cannot be called in question. If the constitution is defective in this respect, it must be amended, not violated. The following opinion is published only after a full discussion in the editorial committee of the *Revue*, and after having received the approbation of several *confrères* of the Montreal Bar.

By the common law, all the public lands are the property of the Crown. It was formerly a disputed question whether the Kings of England had the right to alienate the Crown Lands. In course of time the Kings certainly exercised the right of granting the Crown Lands at their pleasure. But the exercise of this prerogative having greatly impoverished the Crown, it has been restrained by several modern statutes.*

In the Province of Canada previous to 1867, the public lands were the property of the Crown for Provincial purposes and subject to many restrictions enumerated at length in chapters 22, 23 and 24 of the Consolidated Statutes of Canada. Certain free grants could even be made by the Governor in Council. As to the Legislature, its power over the public lands was unlimited.

Under the British North America Act of 1867, the tenure of the public lands has undergone very large modifications. The ownership is vested in the Dominion or in the Provinces, according to the nature and situation of the property. With regard to the Dominion, section 108 declares that "the Public Works and Property of each Province enumerated in the third schedule in this Act, shall be the property of Canada." This property comprises the canals, public harbours and fortifications, and others of a like nature.

The right of ownership in the Dominion of this property is absolute and free from all restriction. Section 91 enacts that the exclusive legislature authority of the Parliament of Canada extends to certain matters therein specified and particularly to "the public debt and property."

Is it thus with the right of ownership vested in the several Provinces? Section 109 declares: "All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union and all sums then due and payable for such lands, mines, minerals and royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate and arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

Thus, the public lands are the property of the Provinces, subject to the restrictions imposed by the law. There is no doubt that if the Imperial Parliament had not made any other provision, the Provincial Legislature could dispose of the public lands in the same manner as the heretofore Province of Canada, subject to the trusts established by previous laws, such as the trusts in favour of the Clergy, the Indians and the Schools. But the constitution, adopting in this respect a policy wholly different from the one applied to the Dominion, has taken care to limit the exercise of the right of ownership of the Provinces to certain objects. It declares at section 92, par. 5, that the exclusive authority of their legislatures shall extend, not to the ownership of the public property or lands of the Province, but to "*the management and sale of the public lands* belonging to the Province and of the timber and wood thereon."

Thus, then, the Province is proprietor of the public lands; she can administer and sell them, but she cannot make a gift of them. Without this 5th paragraph, she might dispose of them according to her good pleasure by sale, gift or otherwise; but with these expressions the enumeration of the powers given ought to be interpreted as limiting and exclusive, according to the maxim *qui dicit de uno negat de altero*.

It cannot be asserted that the 16th paragraph, giving to the local legislature jurisdiction "generally in all matters of a merely local or private nature in the Province," gives to it by implication the right of making land grants. That paragraph, in fact, relates only to matters which have not been expressly provided for by the constitution. Now, as the public lands have been arranged in a certain way, it cannot be supposed that it was the intention of Parliament that the Local Legislature should dispose of them in a different way.

* 5 Cruise's Dig. 46 2 Greenleaf on Real Property, 39.

The intention of the Imperial Parliament appears to have been to ensure the permanency of the local revenues and to put the lands beyond the reach of great corporations, religious or otherwise, like those railway companies which in the United States have become mighty political potentates through the aid of numerous land grants. There can be no doubt that it is it the highest degree dangerous to abandon the public domain in favor of any corporation which is not under the exclusive control of the Government. This question of high political importance,—can have no place in the pages of a legal review. But it cannot be denied that the aim of the framers of the constitution was to prevent these grants, seeing that the prohibition bears only upon the public lands and forests, and does not touch the mines, minerals and other royal reserves or the Provinces, nor the property of the Dominion, over which the respective legislatures have absolute and unlimited control. It may be said that the intention of the Imperial Parliament was to confer upon the Dominion Parliament and the Provincial Legislatures the whole of the powers formerly enjoyed by the legislature of the Province of Canada. We can only say of the legislature with Lord Ellenborough in *Rex* v. *Shone, quod voluit non dixit.** "If the Legislature intended more," said Lord Denman in *Haworth* v. *Ormerod*, "we can only say, that according to our opinion, they have not expressed it."†

"A *casus omissus*," said Dwarris,‡ "can in no case be supplied by a court of law; for that would be to make laws. Judges are bound to take the Act of Parliament as the Legislature have made it."

The grant of public lands by the Imperial Parliament to the Provinces must be strictly interpreted; it must, in fact, be regarded as a grant by the Crown; that is, most favorably to the Imperial Parliament and against the Provinces. "A grant made by the King," says Blackstone, (lib. II, p. 347.) "at the suit of the grantee, shall be taken most beneficially for the King and against the party.....The King's grant shall not enure to any other intent than that which is precisely expressed in the grant." "The King's grants," says Cruise, vol. 5, p. 53, "are construed in a very different manner from conveyances made between private subjects; for being matter of record, they ought to contain the utmost truth and certainty; and as they cheifly proceed from the bounty of the Crown, they have at all times been construed most favorably for the King and against the grantee, contrary to the manner in which all other assurances are construed."

Story lays down as a rule of interpretation of the American Constitution—similar to ours in so many respects—the following principle: "A rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic or even mischievous. If it be mischievous the power of redressing the evil lies with the people by an exercise of the power of amendment."* Further on (sec. 207) the learned commentator remarks: "It is often said that in an instrument a specification of particulars is the exclusion of another. Lord Bacon's remark that as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated, has been perpetually referred to as a fine illustration."

It has been also said, that a statute must be construed, if possible so as to give sense and meaning to every part, and the maxim *expressio unius est exclusio alterius* is never better applicable than in the interpretation of a statute. †

Dwarris, p. 605, says: "The maxim is clear, *expressum facit cessare tacitum*, affirmative specification excludes implication."

It was on the same principle that the statutes by which our Courts were invested with jurisdiction in civil and criminal causes, were recently construed, in the Guibord case, as limitative and exclusive of ecclesiastical matters.

Coleridge *in re The Queen* v. *Ellis*,‡ observed: It is an inflexible rule that under a special power, parties must act strictly on the conditions on which it is given."

It has been intimated that the restriction could be evaded by making a sale to the Railway Companies for a merely nominal consideration. But the Legislatures, any more than individuals, are not allowed thus to trifle with the laws of their country. Land grants are either constitutional or unconstitutional. If they are unconstitutional, they cannot be made in an indirect manner and in fraud of the law. Mr. Justice McLean, for the Supreme Court of the United States, said: "The power must not only be exercised *bonâ fide* by a State, but the property, or its product, must be applied to public use.....The public purpose for which the power is exerted must be real, not pretended."‖

Judge Woodbury said in the same cause: "If on the face of the whole proceedings it is manifest that the object was not legitimate, or that illegal intentions were covered up *in forms*, or the whole proceedings a mere pretext, our duty would require us to uphold them."

How is this want to be remedied? The Constitution has wisely withheld from the Parliament of the Dominion all control over the Provincial lands; it has been conferred expressly and it is certain that it has not been granted impliedly by section 91, declaring that the Parliament of Canada "for the peace, order and good Government of Canada" has general jurisdiction "*in relation to all matters not coming within the laws of subjects assigned*

* 6 East 518. † 6 Q. B. 307. ‡ p. 598.

* Const. of U. S., § 193.
† Brown's Legal Maxims, p. 592; 9 Johns, U. S., 349.
‡ 6 Q. B. 501, 1844.
‖ West River Bridge Co., v. Dix et al., 6 Howard, T. S. 537.

exclusively to the legislatures of the Provinces." The matter of the public lands is especially assigned to the Provincial Legislature.

An amendment of the British North America Act by the Imperial Parliament is the only legal means to remedy the evil. Each Provincial Legislature can change or amend its own constitution without the sanction of the Parliament of Great Britain agreeably to section 92, par. 1; but these changes can affect only its local political organization as established by ss. 58–90, for instance the abolition of the Legislative Council, and they cannot extend to its jurisdiction or the distribution of the legislative powers. These can be changed only by means of an Imperial Statute, sect. 129. This mode of procedure may be slow and troublesome, but it is prudent at the least, if not absolutely necessary.—*La Revue Critique.*

THE JUDGMENTS OF VICE-CHANCELLOR MALINS.

If a Judge is disposed to take eccentric views of law and fact, and to decide in a way which courts of appeal find it impossible to approve, it is hard to conceive any remedy for the evil. In this respect experience does not always teach, and we believe there are not many Judges who take reversals of their decrees by our courts of appeal much to heart.

We are certain that no court of common law would regard as a matter of the least importance the fact that the Exchequer Chamber failed to take the same view as itself, and we quite understand that Vice-Chancellor Malins does not feel himself in any way prejudiced by the circumstance that Lord Hatherley comes to diametrically opposite conclusions on similar statements of fact, and in the construction of the same Act of Parliament.

It is somewhat an invidious task to discuss who is right in this conflict, and we shall perhaps be excused if we simply place the divergence of judicial opinion on record. The most recent instance in which it occurs, is in the case of *Turner* v. *Collins*, decided by Lord Hatherley on the 22nd instant. A voluntary settlement had been made by a son in favour of his father, which the son sought to set aside on the following grounds:—That the plaintiff was a young man, and was ignorant of the nature of the instruments he was induced to execute; that no proper explanation of the effect of what he was doing was given to him; that his interest throughout the transaction was not regarded, and that there had been an entire absence of that independent legal advice and protection which would justify the court in sustaining this voluntary settlement by which plaintiff had given up a large portion of his fortune. In an elaborate judgment, delivered on the 8th July last, Vice-Chancellor Malins came to the conclusion that the litigation was altogether unjustifiable, inasmuch as the deeds in question dated in 1855 simply carried into effect the deliberate, well-considered intentions of the plaintiff; that he had ample independent advice, which put him in possession of a distinct knowledge of what he was about to do, and that the arrangement, having regard to the situation of the family and the relative circumstances of the father and son at the time, was a reasonable and proper one; and that, in addition to all the other objections, the delay of fourteen years in filing the bill, and, admittedly, seven years after the plaintiff had full knowledge of his rights, was fatal to the bill, which, so far as it sought to impeach the transactions of 1855, must be dismissed with costs. From this decision plaintiff has appealed.

Now on the material point as to the due execution of the settlement, the Lord Chancellor differed from the Vice-Chancellor, and concurred alone on the ground of the delay.

He was "unable to agree with Vice-Chancellor Malins that the provision made by this young man for his father, and his father's family, was either a prudent or a reasonable arrangement for a young man circumstanced as he was to have made." The Lord Chancellor then adds this extraordinary remark: "The Vice Chancellor seemed to be influenced by one or two considerations which, with great respect for his Honour, *had nothing whatever to do with the case.*" This is very startling, but as the case was one in which individual opinion of the operation of particular motives upon a man's mind would be likely to differ, the illustration of judicial conflict is not so striking as in a case where the construction of an Act of Parliament is in issue.

As we stated at the outset, we have an instance of this also, the judges being the same.

In *Pemberton* v. *Barnes* (25 L. T. Rep. N. S. 577) the Lord Chancellor reviewed and overruled a decision of Vice-Chancellor Malins dealing with the Partition Act of 1868 (31 & 32 Vict. c. 40). The judgment of the Lord Chancellor opens in a manner quite as extraordinary as the passage in his judgment in *Turner* v. *Collins*, to which we have referred. "It appears to me," said his Lordship, "that in this case the Vice-Chancellor has adopted a construction of the Partition Act which entirely destroys the effect of the 4th section." The suit was for partition of a large estate. The plaintiffs, who were devisees in trust under a will of one equal undivided moiety, asked for a sale instead of a partition, under the aforesaid sect. 4. The Vice-Chancellor held that a large estate like the one in question was not within the purview of the Act, and made a decree for partition. The Lord Chancellor said that the difficulty of partition was dealt with in sect. 3, and that there is not in sect. 4 a single word about the size of the estate or the difficulty of partition—it simply speaks of a case where half the parties interested desire a sale, and it provides that they shall have a prepond-

erating voice. Consequently the decree of the Vice-Chancellor was reversed, and an order for sale substituted for that for partition.

And lastly, the Vice-Chancellor seems to have stretched the equitable doctrine of the liability of trustees to an extent calculated seriously to alarm trustees. The comments of our contemporary, the *Times*, will best describe the alarm:—"The myriad trustees and executors scattered throughout the kingdom will have read with dismay our report of the judgment of Vice-Chancellor Malins in a case reported in our columns last Thursday, and have asked themselves, 'Who, then, is safe?' Many more, who are not yet trustees, will probably have resolved, from a perusal of the same report, never upon any consideration to undertake the office. A man knows that he subjects himself to great trouble for few thanks, but he strains a point to oblige a living friend, or to do what he can for the family of one whom he has known intimately and pleasantly all the years of his manhood. He is content to give his time and his pains for the sake of 'auld lang syne.' Vice-Chancellor Malins shows us by his decision in *Sculthorpe* v. *Tipper* that a trustee exposes himself to many liabilities beyond the mere labour and the vexation of spirit attendant upon it. He may have to make good the value of the estate which he has most conscientiously striven to guard. A man dies, and by his will leaves certain property to some friends to watch over and sell 'so soon after his death as they may see fit.' For little more than two years they dealt with it just as he would have done had he been alive, and it then turns out to their unbounded surprise, as it would have been to his unbounded surprise, that part of it is worthless. If the man had lived, he would have suffered the loss, and those upon whom he intended to confer his bounty would have suffered it: but as he luckily died at an opportune time, his friends and executors find that they are personally called upon to pay for his indiscreet investments. If the law be as it was enunciated by Vice-Chancellor Malins, the executors and trustees in *Sculthorpe* v. *Tipper* must perforce submit to it. There is, however, always the possibility of an appeal, and until the time for it has passed by it would be premature to call upon Parliament to relieve trustees from so unexpected a pitfall." And our contemporary feels so strongly on the case that it goes into the law of it, quotes Lord Cottenham against the Vice-Chancellor, and plainly doubts whether the latter's view of the law be sound.

These three cases even as they stand, the third being unappealed as yet, present an extraordinary condition of things—a condition of things unpleasant to comment upon, and which it is only possible to deal with gracefully by leaving alone.—*Law Times.*

EXAMINATIONS FOR CALL TO THE BAR.

In future the passing an examination in law will be made compulsory on all those seeking admission to the Bar. Hitherto such admission has been obtained in one or other of three ways, viz., by reading in chambers, by attendance at certain lectures instituted by the Inns of Courts, or by submitting to an examination. Upon the first two ways we do not propose to offer any remarks beyond reminding our readers that in the one the payment of a fee of 100 guineas, and in the other attendance at the lecture, not to the lecturer, has been the important point. It is to the third that we would direct attention. The examination for call to the Bar should be pre-eminently practical—how far does it satisfy these requisites? The subjects it includes are five, viz.: (1) Constitutional Law; (2) Equity; (3) Real Property; (4) Jurisprudence, Civil, and International Law; (5) Common Law. For an ordinary certificate, the candidate must "pass" in three at least of the above, viz., in real property, in either constitutional law or jurisprudence, &c., and in either equity or common law. He of course may, and if a competitor for honours must, take up the whole list.

The next point is the amount of reading required in each subject. Turning to the regulations just issued for the next examination we find that the books mentioned under (1) are Hallam and Broom's Constitutional Law. Hallam ends at 1760, and therefore a candidate may pass in constitutional law without knowing a bit about modern legislation, without ever having heard of the Reform Acts, of the Regency Bills, of the various Religious Relief Acts, of the Municipal Corporations Act, or of the "Union." This subject is also dignified with the additional appellation of "legal history," but as the extent of "legal history" required can be gleaned from the "concluding chapter of Blackstone's Commentaries," no student need fear overloading his brains on this score. We might perhaps venture to suggest the addition of May to complete the constitutional history, and a few pages from the Year Books in order to secure some acquaintance with the only source of our legal history.

In the next subject, Equity, an attempt is made to secure a complete general, though elementary, knowledge. Two or three works are set down, each well known to beginners, and candidates for honours have also to look over the first volume of White and Tudor's Legal Cases.

In real property there is also a work named, Williams on the Law of Real Property, the reading of which is, no doubt, useful for instilling into the mind of the eager tyro some theoretical notions. A deeper knowledge is expected to be attained by the perusal of infinitesimal portions of various authors, viz., fifteen pages of Jarman on Wills, twenty pages

on vested or contingent devises and bequests, from Hawkins on the Construction of Wills, a bit of one chapter of Dart's Vendors and Purchasers, and one of Tudor's Leading Cases in Real Property and Conveyancing, viz., *Morley* v. *Bird*.

The last two subjects are a complete mystery. We are utterly unable to conceive what object the Council of Legal Education had in view when they selected the heterogeneous collection of authors grouped under these two branches. The reader on jurisprudence, civil, and international law has to examine in—what? One would naturally suppose jurisprudence, for one thing. Not at all. The aforesaid council utterly ignore jurisprudence. "Austin" is evidently to them a sealed book, unworthy or unfitted for the perusal of future lawyers and legislators. But, of course, they make up for the omission by requiring an intimate acquaintance with Roman law and French law—with that system so often styled perfection, and with the famed Code of our neighbours—and so enabling the student to deduce for himself the principles of jurisprudence. The half of one of the four books of the Institute, and less than an eighth of the Code Civil—not a section from either of the other codes—is all the knowledge of ancient and modern legal systems demanded from a barrister. And his acquaintance with international law is limited to Part II., ch. 2, of Wheaton—*i.e.*, to about one-eighth of the whole volume, and that the least important part. A solitary chapter from Maine's Ancient Law, and Part III. of that schoolboy's book, Lord Mackenzie's Studies on Roman Law, make up the jurisprudence section.

But what shall we say of the Common Law branch? It is an ingenious production, evidently elaborated with much care, and bears on the face of it the marks of many men, the *diversa concilia mentium diversarum*. Seven authors or divisions are included under this subject; the Council of Legal Education is composed of eight members; shall we be very far wrong in assuming that one of them was absent when the common law part of the examination came on for consideration, and that each of the others contributed a portion? "'Smith' was a good book when I was a youngster; put it down," observes one. "Not the whole of it," objects another. "It's on contracts; we must give them something on torts;" and, anxious not to burden the students, he suggests the five shortest of the "Leading Cases" on torts. A third says, "We can't very well omit action at law, though there won't be any necessity for the Reader to trouble them much on that score;" and a fourth adds, "We had anyhow better give something on evidence; I don't suppose, however, they will look at it." A fifth reminds his colleagues that "even in this most moral and civilised age crimes are occasionally committed." We ought, perhaps, slightly to direct their attention to this head. They may find the knowledge they acquire, slight as it will be with most, of some service to them in after life, if not to defend the clients they will never get, at least to protect the characters they now have." And so "The law as to simple larceny" is set down. "They ought to look at some of the statutes," adds a sixth; "we took some trouble over the 24 & 25 Vict.—does anyone object?" and, silent all, a dozen sections are chosen haphazard from 24 & 25 Vict. c. 96 and 100. But a chorus of disapprobation arises when a learned gentleman remarks, with something very like a growl, "The old reports are never read now; it was only the other day that my junior could not comprehend the meaning of 'Cro. Eliz.'" "I have never read Coke, or Rolle, or Croke," say three or four. "I never but once opened the Year Books," ejaculates another; "Heaven save me from venturing on the experiment again." But the old gentleman is obstinate, though he compromises the matter by limiting his demand to four cases taken from Coke.

In what terms shall we comment upon the above as an examination qualifying those who pass it for the Bar? If we style it an utter farce we shall be speaking within bounds. Practice is utterly ignored. Alike in conveyancing, in equity, in common law, a man innocent as a child of practice may be blazoned forth to all the world as a thorough student, and not a mere hey-dey barrister, his *imprimatur*, attested by the conjoint wisdom of the Inns of Court, his certificate signed by the greatest of living lawyers?—*Law Times*.

A point taken in the course of the debate on Sir Roundell Palmer's resolutions deserves more consideration than it received. Admission into the Professions, and particularly to the Bar, taxes the pecuniary resources of candidates too much, and their mental resources too little. Up to the end of last year the question of going to the Bar was simply one of money. It is now equally a question of money, but also a question of brains. The tax imposed by the revenue upon candidates for admission to practise the law is very heavy—much heavier in the case of an attorney than in the case of a barrister. The majority of youths from college will find it difficult to pass the examination without preparation with private tutors, and this is expensive. The same observation has long been applicable to attorneys. These duties which the revenue demands ought to be considerably reduced or altogether removed, the attorneys' certificate duty going with them. We do not attach much weight to the argument that if the stamp duties were abolished many of the public would become members of the Inns of Court, and thus learn some law; but it is much to the interest of the Profession that the Revenue should have as little as possible to do with it.—*Law Times*.

CANADA REPORTS.

ONTARIO.

ELECTION CASE.

EAST TORONTO ELECTION PETITION.

NICHOLAS RENNICK, *Petitioner*, v. The Hon. MATTHEW CROOKS CAMERON, *Respondent*.

Agents—Accounts of expenditure by—Excessive expenditure—Personal expenses of candidate—Payment to canvassers—Refreshments—Treating—Bribery.

A candidate in good faith intended that his election should be conducted in accordance both with the letter and the spirit of the law; and he subscribed and paid no money, except for printing. Money, however, was given by friends of the candidate to different persons for election purposes, who kept no accounts or vouchers of what they paid. *Held*, that bribery would not be inferred as against the candidate, who neither knew nor desired such a state of things, from the omission of these subordinate agents to keep an account of their expenditure, especially as the law is new, and contains no provision similar to the Imperial statute, which requires a detailed statement of expenditure to be furnished to the returning officer. But it is always more satisfactory to have the expenditure shown by proper vouchers; and if money is paid to voters for distributing cards, or for teams, or for refreshments, this will be open to attack, and judges will be less inclined, as the law becomes known, to take a favourable view of conduct that may bear two constructions, one favourable to the candidate and the other unfavourable.

The candidate is not restricted to his purely personal expenses, but may (if there is no intent thereby to influence votes, or to induce others to procure his return) hire rooms for committees and meetings, and employ men to distribute cards and placards, and similar services.

The friends of the candidate formed themselves into committees, and some of them voluntarily distributed cards and canvassed different localities with books containing lists of voters, noting certain particulars as to promises, &c. These canvassers often came across voters in public houses, and when there, according to custom, treated those whom they found there, and thus spent their money as well as their time. On this being represented to those who had charge of the money for election expenses, the latter, in several cases, reimbursed the canvassers. *Held*, 1. That these general payments, if not exceeding what would be paid to a person for working the same time in other employments, would not be such evidence of bribery as to set aside an election. 2. That the furnishing of refreshment to a voter by an agent of a candidate, without the knowledge or consent of the candidate, and against his will, will not be sufficient ground to set aside an election, if not done corruptly or with intent to influence votes

The total expenditure proved was $610, and the number of votes on the roll was 4,669. *Held*, that the expenditure was not excessive.

Various acts of alleged bribery discussed; and *held*, that the evidence was not sufficient.

The language of Martin, B., in the *Wigan Case* (1 O'M. & H. 192), adopted as a general rule applicable to this case.

(Toronto, March 21, 1871, & Sept. 2, 1872.—RICHARDS, C.J.)

This petition was filed on the 29th April, 1871. The third paragraph charged respondent, by himself and agents, with bribery, undue influence, intimidation and other illegal and prohibited acts and corrupt practices within the meaning of the Election Law of 1868 and the Controverted Election Act of 1871, before, during and after the election, whereby he became incapable of being elected or serving in the Legislative Assembly. Then followed objections to many of the voters of the respondent—as not being subjects of Her Majesty: not duly registered on the list of voters; and voters who had voted more than once.

That the votes of voters not qualified by law to vote were received for the respondent.

That votes of persons guilty of bribery, and being bribed and of corrupt practices within the meaning of the Election Law of 1868 and the Act of 1871, were tendered, and received, and recorded for respondent.

That the names of persons were recorded for respondent who had not voted for him.

That certain persons used fictitious names and falsely voted for respondent.

That vehicles to convey electors to and from the polls were hired by the respondent and other persons on his behalf, and the persons who hired the vehicle to convey the electors to and from the polls voted for respondent.

That undue influence was used by persons on behalf of respondent towards a great number of voters to induce them to vote for respondent.

That persons who were employed in reference to the election (during the election) to forward respondent's interest as agents or supporters and who received or expected to receive money, place or employment, voted for respondent.

That persons, not owners or tenants of the value of $400 on assessment roll, voted for respondent.

That owners of property, not rated for a sufficient sum to qualify both, voted for respondent.

That persons who had real property fradulently conveyed to them to entitle them to vote, voted for respondent.

That persons, acting with intent to promote the election of respondent, furnished entertainment at their expense with such intent to electors of the division, contrary to the Election Law of 1868.

And the petitioner claimed that Francis H. Medcalf had the highest number of legal votes, and should have been elected.

Macl.nnan and *Delamere* appeared for petitioner. The respondent himself and *McMichael, contra.*

The petitioner abandoned the charge of personal complicity of respondent in any of the matters charged in the third and twelfth paragraphs of the petition, but not such acts by his agents as might affect his seat; and proposed to shew a large number of votes bribed by Mr. Cameron's agents, and that undue influence was practised by said agents.

The petitioner proposed to go into a scrutiny, but that was afterwards abandoned.

The holding of the election and the qualification of the petitioner was admitted.

On the trial of this matter evidence was given to show the expenditure of various sums of money on behalf of the respondent by his friends. It was mentioned, incidentally, that Mr. McMichael, respondent's law partner, had paid some charges for printing, and this was the only sum that was expended by the respondent himself and as to this, it was not suggested that there was anything that was not perfectly correct.

Any other moneys that were expended were raised by the friends of the respondent, and if any was improperly or illegally expended, it was without his knowledge and contrary to his express directions.

The chairman and secretary of St. James's Ward, the most populous in the division, were examined. They expressly denied the payment of any moneys for any illegal or improper purpose; and the secretary, through whom all the

payments were made, said they were made on cheques and proper receipts and vouchers were taken therefor, and the same could be produced if desired. The explanation offered by the secretary seemed satisfactory.

No point seemed to be made of the expenditure by Mr. Scott, the secretary of St. James's Ward.

Mr. Warwick, the secretary of the Committee of St. David's Ward, was twice examined. On his first examination he stated he had prepared books from the roll; the books were supplied by the General Committee. There were fifteen or sixteen of the Committee, and they did the canvassing. He used no money; was not promised any. He saw some money paid for cards or bills by Mr. John Carruthers, chairman of the committee of that ward; saw money paid for posting bills; saw one Harrington paid by Carruthers; saw some other money paid by Carruthers for something connected with that work. Several persons were paid for carrying around cards; some fifteen or twenty dollars was thus paid. Parties were paid for going round to give notice of committee meetings and for carrying around cards; saw as much as $2 given to a messenger, and as many as sixteen employed to carry around cards. Half of the number may have got nothing. Was not paid for his services. He knew very well Mr. Cameron had never been in the habit of paying for such services, and he had very little hope of ever receiving any for his; never received anything from any one for his services. Mr. Cameron visited the committee room and told him to be sure and have no money promised or paid for votes, and to be very careful and do nothing wrong. He gave up his school during the whole canvass, about fifteen days; no bargain about being paid; would not say he had no hope of being paid. He was subsequently recalled, and a paper shewn him containing a list of names of about 47 persons under the heads "names," "services," $, cts. Under the head of "services" opposite most of these 47 names were entered "scrutineer," "canvasser," "scrutineer," &c. Opposite a few, "meetings scrutineer," "meeting canvasser." The largest sum opposite "scrutineer and canvasser" was $15 opposite the name of G. Morphy. Opposite the names of four persons $10 is put, and the remainder, $3, $4, $5, $2, and as high as $7, and half-a-dozen as low as $2. One name in pencil, Mitchell, has $20 opposite it. Joseph Duggan's name is put down, "use of room for committee 12 days, 2 meetings, &c., $30. Fred. Warmoll "12 day's constant attendance at committee room from 9 to 7, making out canvass books, including payment of two meals each day, $30." There is a pencil memorandum at the bottom of the page, $306. If that was intended to be the addition, some claims amounting to $18 were added afterwards. The three last items in the statement would make the amount. In relation to the memorandum he stated it was in his own handwriting, that the men mentioned in the list claimed those amounts as what they ought to have. He gave it to Mr. Carruthers after the election was over, with all the other papers. When he made up the paper he told them he thought there was no chance of their getting anything. The parties named came to him to put their names down. They abused him about it; said he and Carruthers had got the money between them. When Mr. Carruthers employed men to distribute the tickets, he told them they should not get more than a common day's work, that they should do a little for the cause without pay, as others did. When he put down their names he told them they might as well put down three times as much as it was worth, they had been engaged with the knowledge that Mr. Cameron or Mr. Carruthers would not pay for these services. They had been so warned in his presence before they went to work. The parties named came to his house, he did not go to them. He might have seen them in the committee room—they must have come to him. He never saw the paper since he gave it to Carruthers until then. He spoke to Carruthers about his own claim, and Carruthers said he had nothing to do with it.

Mr. Degrassi, the secretary of the central committee, said parties had applied to him for pay, but they were told there was no chance of their getting any.

Nineteen of the persons named on the list were called as witnesses. They almost all denied any knowledge of their names being on the list, or expecting any money, or having been promised any. Among the rest,

Thomas McDonald, whose name is on the list for $5. He borrowed two sums of $5 from Carruthers, who is his father-in-law, during the election. He says he received nothing, nor gave anything to any one to vote for Mr. Cameron. Carruthers in his evidence said he paid McDonald two dollars for distributing cards, &c.

John Roddy, whose name is on the list for $5, says he never made any claim to Warwick; but Warwick told him he had heard from Carruthers that those who acted as scrutineers were going to get something, and his name was down for $5. He said he was never promised any money, and did not expect anything until Warwick mentioned it. He never went for any.

Joseph Duggan, whose name is on the list for $30 for use of rooms, said Carruthers asked him what his charge was. He told him he made no claim, and he had not made any claim.

John Fitzgerald, whose name is down for $10, said he got $5 from Mr. Carruthers for distributing tickets—two dollars at one time and three dollars at another—and he was about nine days and nights canvassing and distributing. He asked Carruthers at one time if anything more was to be got? He said he did not know anything about it. He asked Mr. Warwick how he was getting along, and he said the election was protested. Carruthers paid him the money not for his interest, but his labour. He did not promise him anything more.

Lewis Walker, whose name is down for $2, received $2 from Carruthers. He and some other men undertook to canvass in a certain section, and in doing so spent money for refreshments. He told Carruthers he could not afford to lose his time and spend money in going about. Carruthers told him he had got money from Mr. Gooderham to pay for printing, but nothing to give away. He told him he would pay him for his time out of his own pocket, and to go on. He gave him $2, and that was all he received.

The rest of those who were called whose names appear on the list denied having authorised any claim or application being made on their behalf. They did not claim anything and did not expect anything.

Besides the expenditure by Mr. Scott, Mr. Carruthers, Mr. Hamilton and Mr. Hynes appear to have been the parties who principally expended money in detail.

Mr. William Gooderham, the younger, seems to have placed in Mr. Carruther's hands for the purposes of the election about $150, and in the hands of Mr. William Hamilton, the younger, for a similar purpose $100. He states that when giving the money to Carruthers, it was mentioned the money was required for posting bills and other legitimate purposes of the election. He understood the payments were to be made for bill delivering, bill posting, and the proper expenses of the election. The money given to Mr. Hamilton was for St. Lawrence Ward, getting bills, tickets and cards printed, &c. He understood Mr. Carruthers was to do the necessary printing, the distributing tickets, and pay the other legitimate expenses. His impression was that some printing was done by the central and some by the ward committees. He supposed parties had to be paid for taking around tickets, and for rooms to hold meetings in, and other legitimate purposes. He told him to be careful and spend the money for legitimate purposes only.

Mr. Thomas C. Chisholm placed in the hands of Patrick Hynes about $80, and of John Reid, $80, and he spent about $40 himself; making his expenditure about $200. He gave the money to Messrs Hynes and Reid to expend in printing and distributing cards, paying for committee rooms, &c. He told them he did not want Mr. Cameron defeated and that they were not to expend the money for any purpose that was not legitimate. He believed it was so used. He thought it was to be used in the three wards. He gave it to them because he supposed they would use it to get canvassers and printing, and other legitimate purposes. Did not think the central committee printed all the cards; thinks there were other cards printed besides

Mr. John Carruthers in his evidence, (which the learned judge in his judgment characterised as very vague and unsatisfactory in the commencement) said there might be as high as $5 a-piece paid for carrying around cards. He said he had paid all the expenses that had been paid in St. David's Ward, as far as he knew. Could not say how much he paid in these matters. It might or might not be $100. It might or might not be $50, for anything he knew. He did not get the funds from any one for the purpose of paying the amounts in the statement. He did not know whose writing it was in, to the best of his knowledge; he never saw it before. He gave money to McDonald—a dollar or two. He gave no man $10; he did not spend $200. Won't swear he did not spend $100. He says he got money for election purposes from Mr. Gooderham. It was a small trifle to pay for posting up some bills. It was cash to pay some men they had going round posting bills. Mr. Gooderham said to him directly there was to be no money paid for votes. Thinks no one has asked him to pay for any services rendered during the election for Mr. Cameron. He might have given Lewis Walker a dollar or so. He kept no accounts of the payments; had no reason for not doing so. If he paid Walker any money, it was for delivering cards. No one received money for voting, nor did he ever give any one money to pay them for voting or for influencing their vote. He was strictly forbidden by Mr. Cameron to pay money. Heard him say if one dollar would secure his election, he would not give it. Was never authorised by Mr. Cameron to pay for distributing cards or anything else. If he did so, it was on his own account entirely. He was sure that in any money paid for distributing cards he did not allow each one more than at the rate of a dollar a day for what he did. The canvassing and committee meetings, off and on, lasted about two weeks. No person he employed as a canvasser or scrutineer was ever paid by him even at the rate of a dollar a day.

On his subsequent examination, he said people came themselves and volunteered to take a book and go and canvass for Mr. Cameron. There were arrangements as to certain parties taking certain districts. He would give each man a couple of streets, perhaps four or five; for two other streets, perhaps a dozen. Sometimes they would send men over the same ground. He thought some of the men made mistakes. Only paid parties for delivering cards. Might have had notices sent out for holding meetings—that was most of it. The persons so employed were generally voters. He spent all the money he received for those purposes The services they rendered were not as well paid for as if they had been labouring men employed by the day. Most of his own men got double pay for the same time as these men got who delivered these tickets. He denied that Warwick had ever handed him the list or any paper connected with the last election, except two or three scrutineers' books and some bills for printing. There might have been some small memorandum books. He had destroyed or lost all of them.

William Hamilton, jun., chairman of the committee in St. Lawrence Ward, said he paid some money for distributing cards and posters, and some other legitimate expenses, and for no other legitimate expenses that he knew There were fourteen or fifteen employed to distribute cards or posters; most of them strangers to him. He paid them $5, $6, or $10 a-piece, according to the time they rendered. They did not render any account, and he got no receipts or vouchers. He could not recollect the names of any of them. Could not say if they were electors. At the ward meetings these persons came and rendered their accounts of the time they had been occupied in distributing the cards. In addition to these, there were two or three who canvassed. The persons to whom money was paid were those who went about posting bills and distributing cards. He employed fourteen or fifteen men. Thinks it would take four or five days to distribute the cards. They looked as if they were persons taking an interest in the election. He could not name any man he had paid money to. He spent from $80 to $100 in the election in this way. He kept no account of it. Got the money from Mr. Gooderham. He did not put down the names of persons to whom he paid

money; knew Mr. Gooderham had confidence in him, and he would take his word for it. The money was paid for distributing cards. The bills were posted by the printers. It was given to fourteen or fifteen persons; thinks it was all done in a week or ten days. He did not suppose it could be done for less; believes it was a reasonable sum to charge. He paid after the service was rendered. It was considered a fair sum, and he so believed it at the time, and it was not given for the purpose of inducing them to vote. He did not think any of them voted, because he did not know they voted. He did not bring any of them to vote, and did not see any of them vote. He was not aware of any one else paying any money in that ward.

Patrick Hynes said he received from $75 to $100 from Mr. Chisholm. It was given to men who were distributing cards. He gave it to them with a distinct understanding and belief that they were distributing cards. To some who said they were out three or four days he gave four or five dollars a-piece. Some might have worked in St. James' Ward. He understood they were generally working in St. David's Ward. Mr. Carruthers said he had got some money from Mr. Gooderham to pay for distributing cards—he mentioned $50—that he had paid out all he had got, and people were finding fault with him that he had not paid them. He said he could not get enough to pay them all. He did not canvass any of the men; he understood they were warm friends of Mr. Cameron and were anxious for his success, but were not able to spend their time in doing this work without being paid. He thought it was legitimate work. He believed they had done the work. He did not know if they had spent all their time in canvassing; they appeared not to be doing anything else He saw them both in the day time and at night. He did not keep an account of those to whom he paid it. He, of course, treated parties; he did not consider it as done to induce them to vote. He thought it likely he spent from $75 to $100. He knew most of the men, but could not tell their names. If the parties came to him and said they had been out two or three days canvassing, he would pay them for it. They were labouring men or a poor class of mechanics. He did not ask when he paid them if they had worked all the day, or how many hours they had been out. He understood they had been employed and paid them accordingly. Mr. Chisholm gave him the money for legitimate purposes. He understood that distributing tickets, posting bills, and work of that kind was considered legitimate, and that was the purpose for which it was expended. Never was expended, that he was aware of, for the purpose of bribing the electors, and none used for the purpose of treating at any meeting of electors. None given for the purpose of bribing himself. None were paid a sum, he thought, equal to fair wages for what they did, supposing them to have worked as they said they did and as he believed they did. He did not think any man got over $5; some may have got more, others may have only got one or two dollars. He could not say if any of those mentioned in the list as entitled to money in St. David's ward were paid by him. Could not recollect that they were.

John Reid's evidence was not given at first in a very frank manner. He said he received money from Mr. Chisholm. He did not know how much; did not count it. Was certain it was not $1,000 or $200. It was under $100; he did not count it. It was over $25. He could not come any nearer than that. The money was spent in distributing cards through the ward. He had no idea how many were distributed. They were given to the men to distribute, two or three together distributing them. Knows the names of a good many who were employed distributing. Thinks G. Morphy was so employed. Did not give him any money. Does not remember giving money to any of those mentioned in the list. Does not remember the name of any one he did pay; is not aware that he paid anybody; can't name a single person to whom he paid any of it. Is quite sure he has not the money still. He gave it to persons for distributing cards at promiscuous meetings. He did not remember to whom he paid it. Did not give any cards to those who would vote for Medcalf. Thinks he spent some of his own money in that way. Can't tell how much. Thinks he spent of his own money less than $100 and over $25. He spent all the money he got from Mr. Chisholm. Did not think he had spent $80 of his own money. Will not swear he did not. Did not know of any but himself spending money at that election. The money that he spent of his own and Mr. Chisholm's was spent entirely in the distribution of cards. He thought the parties were friendly to Mr. Cameron. His impression was that some were electors and some were not. To most of them he paid a couple of dollars; he gave each man what he thought he was worth. Did not know if they asked him for payment. They were men in middling circumstances. Very few of the labouring class had votes. They seemed very anxious for their man before they got the $2. Thought there were about 1000 voters in St. David's ward. Did not know Mr. Hynes had any money to spend. Mr. Chisholm did not tell him so. Did not tell any of the committee he had funds for distributing cards. No particular arrangements were made by the committee for distributing cards, except that certain men had certain localities for distributing cards in. Some were paid and some not. He paid some not mentioned by the committee. He gave cards to men to distribute himself. The secretary of the committee in St. David's ward generally distributed them. He was not aware that the committee knew he was distributing them promiscuously He told the men when he gave them the cards, the streets he wanted them distributed in. He could canvass on 300 in a day. Did not think that an unreasonable number; thought 500 not unreasonable. Some days he could not canvass over 20. Sometimes a man would require a longer time to persuade. He said three or four hundred would be a great many to canvass in a day—to go from house to house. If it were only necessary to throw the card into the house, three or five hundred cards could be distributed in a day. Did not think he spent $75 in distributing tickets. Mr. Chisholm did not pay anything to him for the purpose of influencing him: all he was worth would not influence him. He supported Mr. Cameron before Mr.

Cameron gave him the money. The money was not given for the purpose of influencing other voters, or bribing them. He did not use the money for the purpose of influencing the voters, or corrupting or bribing them; he used no money for corrupt purposes. He was well aware Mr. Cameron was opposed to spending money for the purpose of the election.

Richards, C. J.—It was conceded, and the evidence seems to establish beyond all doubt, that the respondent, in good faith, intended that the election should be conducted, not only according to the letter of the law, but according to its very spirit and intent. He subscribed no money, and paid none, except for some printing, the amount of which was not mentioned, and which there is no doubt it was proper for him to pay; and it did not appear that he even knew that any considerable amount of money was being expended.

When a man so situated is to be held liable for the acts of his agents, the observations of Martin, B., in the *Westminster Case*, 1 O'M. & H. 95, seem to me to enunciate opinions that will meet with general approbation: "The law is a stringent law, a harsh law, a hard law; it makes a man responsible who has directly forbidden a thing to be done, when that thing has been done by a subordinate agent. It is in point of fact making the relation between a candidate and his agent the relation of master and servant, and not the relation of principal and agent. But I think I am justified, when I am about to apply such a law, in requiring to be satisfied, beyond all reasonable doubt, that the act of bribery was done; and unless the proof is strong and cogent—I should say very strong and very cogent—it ought not to affect the seat of an honest and well-intentioned man by the act of a third person."

It was urged on behalf of the petitioner, that large sums of money were expended to aid in the election of respondent, and the responsibility was cast on him to show that it was spent in a legitimate manner.

In the *Bradford Case*, 1 O'M. & H. 30, the respondent opened an unlimited credit at his banker's in favor of his agent, who availed himself of it to the extent of upwards of £7,200; and the agent sent the returning officer a mere abstract of the totals of outlay, unaccompanied by vouchers; and this was knowingly done, contrary to the statute 26 & 27 Vic. cap. 29, sec. 4. It was shewn that large numbers of electors were influenced by corrupt practices committed by the agents of respondent. Martin, B., said as to this (p. 33 of the case), that his impression was, if petitioner's counsel had put in the account, and proved that no bills or vouchers had been delivered to the returning officer, he would have called on the respondent to prove the legality of every payment contained in the account from the beginning to the end of it. His impression was that that alone would have made a *primâ facie* case against any person, especially when he called attention to the amounts contained in that paper.

The Imperial statute referred to required that no election expenses should be paid except through an agent, whose name should be given to the returning officer, and it was to be published. The bills were to be sent in to the agent within a month. A detailed statement of expenditure, with vouchers, was to be furnished by the agent to the returning officer within two months after the election.

We have no such provision in our statutes, and we are now for the first time called upon to carry out the provisions of the law, which has been characterized by Baron Martin as a harsh law, and apply its principles to the conduct and actions of men, some of whom have never been accustomed to keep accounts of any kind, and certainly not accounts and vouchers relative to election expenses. I do not think I can be called upon, as against a person who neither knew nor desired this state of things, to infer bribery from the omission of these subordinate agents to keep an account of their expenditure, or to recollect the persons to whom the money by them expended was paid, as I would do if administering the law according to the enactments which prevail in England on the subject.

Here the money was not furnished by the candidate, nor does it clearly appear that he was aware that any had been subscribed, or was being expended for the purposes of the election; but it is probable he may have thought that was the case, and it appears he impressed upon his friends the absolute necessity of obeying the law. If he had been aware that a lavish expenditure was going on, or if it was manifest that money was being ruthlessly used, he ought to have checked and prevented it; and although if I were satisfied the money had been used for corrupt purposes I would be compelled to avoid the election, yet I do not feel called upon to infer that it was so used from the mere absence of a satisfactory account of its expenditure, verified by vouchers.

There has been no evidence given to show that the expenditure, on the whole, was excessive, if the kind of expenditure referred to is allowable at all.

Mr. Scott expended say about $300 in St. James's Ward—no objection is offered to the expenditure or its details; Mr. Gooderham gave Carruthers say $150; Mr. Chisholm gave Hynes $80, and Reid for all the wards, $80; say, if all expended in St. David's Ward, $210; Mr. Gooderham gave Hamilton, for St. Lawrence Ward, say $100; making in all $610.

The number of votes on the roll, in St. James's Ward were 1,856; St. David's, 1,827; St. Lawrence, 986.

If the expenditure in St. James be considered a fair one at $300, the others do not seem unreasonable, though the St. James' committee may have paid for more of the printing than was paid for in the other Wards.

From the manner in which they gave their evidence, I was under the impression that Hamilton and Hynes had spent all the money placed in their hands for the purposes they mention—for the *bona fide* object of paying for services rendered, and not with a view of corrupting or unduly influencing votes.

As to Carruthers, I am by no means satisfied that he paid out all the money he received. The list, which the petitioner's counsel in some mysterious way obtained possession of, shewed the names of persons who had been employed in

taking around tickets, some five of whom had received small sums, and the larger portion had not received anything, and never asked or expected anything. Some of them, when applying to Carruthers, were told he had no money to expend for these purposes, but only for printing; yet he paid some small sum, as he said, out of his own pocket. If he was unwilling to pay these men for the services so rendered, and who were all friends of Mr. Cameron, out of the money he received, I do not think it likely he would pay over the money to induce others to vote for Mr. Cameron. Warwick, in his evidence, said that many of the parties who applied to him for their pay, stated that Carruthers and he had received money to pay these expenses, but had kept it themselves. Hynes said that Carruthers told him he had received some money from Mr. Gooderham to pay for printing, &c., but he understood it was only $50. It may have been he had only received $50 then, as Mr. Gooderham said he paid the money to him at different times.

The evidence of Reid was equally unsatisfactory, and did not impress me with the conviction he had spent all the money he received in paying expenses connected with the election, whether legitimate or otherwise.

It is contended that the decisions under the English statute are not applicable to the state of the law existing here.

Reference is made to the three clauses of the second section of the Imperial Statute, 17, 18 Vic., cap. 102, which enacts "That every person who shall directly or indirectly, by himself or any other person on his behalf, make any gift, loan, offer, promise, procurement or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavor to procure, the return of any person to serve in parliament, or the vote of any voter at any election," shall be guilty of bribery.

In the *Coventry Case*, 1 O'M & H. 100, Justice Willes, in referring to this section, says: "Therefore anything, great or small, which is given to procure a vote would be a bribe; and if given to another to purchase his influence at the election, it unquestionably would be a bribe, and would avoid the election." Our own statute, 32 Vic., cap. 21, sec. 67, 3rd paragraph, is in the same words.

At the conclusion of the second section of the Imperial Statute are the words, "Provided always that the aforesaid enactment shall not extend, or be construed to extend, to any money paid or agreed to be paid for or on account of any legal expense *bona fide* incurred at or concerning any election." The proviso at the end of the section in our Statute is, "Provided always that the *actual personal expenses of any candidate, his expenses for actual professional services performed, and bona fide payments for the fair cost of printing and advertising*, shall be held to be expenses lawfully incurred, and the payment thereof shall not be a contravention of this Act."

It is argued that the effect of our Statute is to restrict the candidate to the payment of his personal expenses—that is, for his own board, lodging, horse hire, travelling expenses, I suppose, and his expenses for actual professional services performed, meaning fees paid to lawyers for their services as such.

In this view, he could not hire a room to meet the electors in, or for his committee to meet in, unless he were then personally present; and none of his committee could hire a room for that purpose, (for that would not be for professional services,) if such room belonged to a voter, and none other could be conveniently obtained. I am not inclined to put this narrow construction on a Statute so highly penal as this is. The plain and reasonable meaning of the Statute seems to me to be what its words indicate, that when the prohibited things are done "in order to induce such person to procure or endeavor to procure the return of any person to serve in parliament, or the vote of any voter at any election," the person doing this shall be guilty of bribery.

In the *Coventry case*, the point was whether one candidate offering to pay the expenses of a co-candidate was guilty of bribery, and reference being made to the proviso in the section of the English Act, the learned judge (Willes) said, "It does not relate to the expenses of voters. To pay the expenses of voters on condition of their voting or abstaining from voting, is unquestionably bribery." He then proceeds, "But the candidate may pay his own expenses, and employ voters in a variety of ways; for instance, he may employ voters to take around advertising boards, to act as messengers as to the state of the poll, or to keep the polling booths clear. He may also adopt the course which appears to have been adopted in this city, that is to say, the city or borough is divided into districts, and committees are formed amongst the voters themselves, of selected persons, who go about and canvass certain portions of the district, and for their services these persons are sometimes paid and sometimes not paid. Now, unquestionably if the third clause of the second section was to be taken in its literal terms, the payment to canvassers under such circumstances, being, as it is, a payment to induce them to procure votes by means of their canvass, would come within the terms of this clause, and would avoid the election. We have, therefore, a test supplied of the meaning of the third clause of the second section, by means of which we see that it was not intended by this section to do away with every payment made by the candidate in the course of the election." After referring to the *Tamworth Case*, where reference is made to the cases, deciding that employing voters and paying them as canvassers was not colorable; he then refers to the *Lambeth Case*, in which voters employed as canvassers were paid, and it was not considered illegal. He adds, "It is hardly necessary to point out how exceedingly dangerous the adoption of that system is, both in respect to the payment of canvassers, and also in respect of that which has been held lawful, viz: the supply of fair refreshments to unpaid canvassers, whilst engaged actually and not colorably, upon this work; and in like manner, of refreshments to committee men. It is proper, when this system is referred to as not being unlawful in itself, to say that it exposes members to very great danger, and when it is merely colorable, it would avoid the election." He comes

to the conclusion that paying the expenses of a co-candidate is not bribery, and is not prohibited by the Statute. He further adds, "You must show an intention to do that which is against the law, before you bring the case within the highly penal clauses of the Statute."

From the evidence given, and the surrounding circumstances, I do not feel warranted in inferring that the sums really paid to electors for putting up placards, distributing cards, and similar services, were paid colorably and to influence votes.

The course pursued, as I understand, was that Mr. Cameron's friends formed themselves into committees in the several wards, and persons came forward and volunteered to distribute cards in the several localities. They were furnished with books showing the names and residences of the parties they were to call on, and they returned these names and the answers they gave as to whom they would vote for, to the Secretary of the committee; and in that way the information was conveyed to the scrutineers as to the parties who were on the list, whether they were in the city, whether they were dead, and for whom they were expected to vote. The parties entrusted with these books and tickets were, it may be presumed, those in whom the friends of Mr. Cameron had confidence, or they would not have had that position. When the parties commenced to distribute cards, &c, they often found the parties on whom they were to call at public houses, and when there, and speaking on the subject of the election, they, as seems to be the almost universal custom with the class of men whom they meet, asked them to drink, and if others were present they were also asked. The consequence was, the parties distributing tickets frequently spent their money, lost their time, and got no pay. When this was represented to the parties having funds to expend, they considered it a legitimate purpose to pay these parties for their services a reasonable sum, not at any time exceeding what would be paid to a person for working the same length of time in other employments. I cannot say that the evidence of these general payments, shows any such bribery as would justify me in setting aside the election.

On this particular feature of the case, I may as well remark that when a candidate or his friends expended large sums of money during an election, it is always more satisfactory to have such expenditure shewn by correct and proper vouchers; and if any money be paid to voters, or large sums paid out for refreshments, or teams used in any way, this will be open to attack and observation, and judges will be less inclined as the law becomes known and its provisions pointed out, to take a favorable view of acts and conduct that may bear two constructions, one favorable to the party elected, and the other against him.

As to $10 paid to Mr. McDonald, the son-in-law of Carruthers, Carruthers himself says he gave him a dollar or two. McDonald says he borrowed from him during this election, $5 at one time and $5 at another, and this had nothing to do with the election. He seemed to be a warm supporter of Mr. Cameron, and I am not inclined to think Carruthers gave him the $10 on account of his services during the election, or to bribe him.

The next point is that with intent of promoting Mr. Cameron's election, Mr. Chisholm spent money for supplying drink to a meeting of electors, assembled for the purpose of promoting such election.

Mr. Chisholm gives evidence on that point, and it is the only evidence given on the subject. He says his own expenses were, on the whole, for cab hire and money paid at ward meetings, about $40. He was ill before the election, and hired cabs to take him from one place to another. After the meetings were over he asked those present to drink, and all present drank. He said his object was to be friendly with them, and if, after that, they were friendly to his candidate he was glad of it. His largest expenditure in any evening was six or seven dollars, including cab hire. When he asked the people to drink the question of voting was never mentioned. He did it on his own account. In doing so he had no desire to influence the people's votes. The object I had in view was this: "When men take an interest in these matters, as I did, and exert themselves, if they don't treat people they think they are mean, and I did not wish to be considered mean." Without deciding that furnishing refreshment by an agent of a candidate, without his knowledge or consent, and against his will, will set aside the election, I think I may dispose of this point in the case, in deciding whether what was done was done corruptly, to influence votes. The lengthened exposition of the cases, as to furnishing refreshments, in the judgment of Chief Justice Hagarty, in the *Glengary Case*, makes it unnecessary for me to refer to them at length.

In the *Tamworth Case*, where men were employed to keep the peace on the polling day by an agent of one of the respondents, amongst whom were some 29 voters, at 10s. a-head, Mr. Justice Willes had to consider why the agent employed those men, and he said, "I believe he employed them because he desired to gain popularity for himself, and because he desired to make a handle of their employment to gain favor for himself amongst the class to which the men belonged. * * * * Upon the whole, however, I come to the conclusion, that it was an unauthorised act, done by Baraclough for the purpose of obtaining popularity for himself, and that it was not, either in respect of the question of Law, or upon the established facts, an act which I can designate as having been bribery. It is an act which, so far as I judicially can, I reprehend and condemn; and if I thought it had been done by him with any view of advancing the interest of his employers, so that I had to impute the intention to do that which was the natural consequence of the act, I must have held the election to be void."

Looking then at this as an unauthorised act against the wishes of the candidate, I think the fairest and most reasonable conclusion to arrive at is what Mr. Chisholm himself says, viz.: that he treated because people would have thought him mean if he did not, and without any corrupt intent.

The next class of cases to which my attention was directed was that of those to whom offers of

bribes were made to induce them to vote for respondent.

The first is John Fulton. He stated that Leonard Hewit asked him to vote for Mr. Cameron. He said he could not. Hewit asked if he was not going to build a house; he said he was. Hewit said he would give him two thousand feet of lumber if he would vote for Cameron. He said he could not do it. Hewit said he would send him some more if that was not enough. He said he voted for Medcalf. Mr. Cameron's scrutineer swore him, and that was the way his name came here. On another occasion, just to try him, he asked Hewit what he would give him to vote for Cameron. Hewit said $20, just to try him; he said he wanted more. Hewit finally decided he would give him $25, and gave his word of honor he would make it all right. Hewit asked, would he not take his word and honour until after the election. He said he supposed he must, and he was to vote for Mr. Cameron.

On cross-examination he said he did not promise to vote for Mr. Cameron. He said he wanted to get a hold on Hewit, he thought he was too officious, and he wanted to get hold of him. He said he never promised to vote for Mr. Cameron. He would travel from here to Cooksville on his bare feet to vote for Medcalf rather than for Cameron. He said there were plenty of men present when the conversation about the lumber took place, but he could not name any of them. The first time he thought Hewit was in earnest, and he was so himself when he refused him. The men could not hear them. He could not tell a single man present when Hewit made the offer.

Hewit was called and denied ever offering him any lumber to vote for Mr. Cameron. He said in conversation (they worked in the same shop with other men) about the candidates, that Fulton said when he last voted he got lumber enough to build a house, and he would not vote for either of the candidates unless they came down. He asked him if he thought Metcalf would come down, Fulton said he did not think he would. He (Hewit) said if that was the matter he was foolish for voting for him, that the Government had plenty of money and lumber too; that was about the substance of his conversation. He did not offer to send up 2000 feet, or any lumber. He did not offer him $25 to vote for Cameron. He must be labouring under a mistake, he never offered him a copper. Hewit contradicts Fulton's statements as to offering to give him $20 or anything. He never understood from beginning to end he was to vote for Mr. Cameron; always understood he was to vote for Medcalf. He canvassed for him. He did not know Fulton had a vacant lot. He said that what he did say to Fulton was in the way of chaffing, and as a joke. He said he was foolish for voting for Medcalf; that the Government had plenty of money and lumber too. Nothing was said from which any person could seriously infer that he intended to offer Fulton anything to vote for Mr. Cameron. He did not think 2000 feet of lumber or $25 in cash would have induced him to vote against Medcalf. From the manner in which these men gave their evidence, I was not satisfied that any serious offer to bribe Fulton had been made by Hewit.

The other persons to whom offers were made were George Smith, James Agnew, and Samuel Nisbet.

George Smith said that one of the Gooderhams, he did not know which, said if we would vote for Mr. Cameron—if we all supported him down there, they would give the right to have South Park street through. He believed they surveyed it out the day before the election. He believed Gooderham owned a small lawn.

I understand by this that Mr. Gooderham would consent to a street being continued through the lawn. Whether this gentleman was an agent of Mr. Cameron's or not does not appear. I think we cannot on this vague kind of statement unseat the sitting member.

George Smith also stated that Carruthers told him he had bets on the election, and he could make more bets if he (Smith) would vote for Mr. Cameron. He said he would give him $20 if he would vote for Mr. Cameron against the old man (meaning Mr. Medcalf). Smith said he would not take $100 and vote against him. He said he could make up bets, he had one made with Victor Thomas at the same time. Carruthers said he would win the bet if he voted against the old man. This was on the nomination day, the speaking was going on, it was a little damp, and he wanted to get away.

John Agnew said that on the night of the meeting at the Dutch Farm, Carruthers said to him, "You always did go for me." He replied, "But I can't now." He would do all he could for Mr. Cameron only for Mr. Medcalf. Carruthers said, "You had better have a couple of dollars. You will have your mind made up before the election comes on." He said he had his mind already made up.

Samuel Nisbet was a scrutineer for Medcalf. He said he met Carruthers at Duggan's Tavern, McDermott and McDonald were there. Carruthers said if he would go with them, he had a nice inside job for him to-morrow. Nisbet said he could not promise. Carruthers said if he went with him he would not rue it, that there was lots of money going. He (Carruthers) said before Wednesday or Thursday night at the outside, he should be recompensed. McDermott and McDonald pressed him to go with them—said there was lots of money. He asked how money could be used. They said they would make that all right, saying, before Wednesday or Thursday night he would find out. On the day of the polling McDermott and McDonald came in, they were surprised to see him there acting as scrutineer for Medcalf, they began to abuse him and call him names. He threatened them if they did not keep quiet at the polling booth, he would use their own words against them. They told him if he had got the two dollars the night before, he would have been for Cameron.

On cross-examination, he said he told Macdonald the day of election he would use the words against him. He first told it to the petitioner's solicitor that day. It was not known, before the conversation at Duggan's, that he was going to support Medcalf. He did say something to Mr. Cameron at Lynch's; found fault with him, and showed a preference for Medcalf; and

that was before the conversation at Duggan's. He fell in at the end of a meeting in favor of Medcalf at Duggan's; was also at a meeting at Hamilton's, and said something to two of Cameron's supporters there.

Mr. Carruthers was called, and said he never offered Smith a cent to vote for Mr. Cameron. Smith said no money would induce him to vote against Medcalf. He never gave or offered Agnew two dollars to vote, or make up his mind about voting. He knew very well he would vote for Medcalf, whatever might have been given to him. He denied speaking to Nesbit at Duggan's; he had observed him at Foley's tavern before that, and he would not speak to him, and did not all that night. He never hinted to him that the Government had plenty of money, and could pay election bills. Nesbit was trying to prevent Mr. Cameron from speaking at Lynch's, by making a noise and shouting, before seeing him at Duggan's. He saw Agnew at the lager beer saloon, and he was drunk.

McDermott said he saw Nesbit at Duggan's, and asked him who he was going for. He said he did not know. He offered him nothing to vote for anybody, nor did Macdonald. He and Macdonald did not take Nesbit aside to speak about the election, nor offer him anything to vote. He denied having the conversation with Nesbit which Nesbit said he had had with him. The quarrel at the poll began from Nesbit swearing McDermott as to his vote; and the latter then said if he had got two dollars the night before, he would have been for Cameron. He said he thought he wanted to be bought, coming round a committee room the night before the election, not knowing who he was going to vote for.

In the *Cheltenham Case*, 1 O'M. & H. 64–65, when the question came up as to evidence in the case of an offer to bribe, Baron Martin said, "When the evidence as to bribery consists merely of offers or proposals to bribe, the evidence required should be stronger than that with respect to bribery itself, * * * it ought to be made out beyond all doubt, because when two people are talking of a thing which is not carried out, it may be that they honestly give their evidence; but one person understands what is said by another, differently from what he intends it."

Looking at the whole evidence as applicable to the offer to bribe said to have been made by Carruthers to Smith, Agnew and Nesbit, I do not think such a clear case is made out as would justify me in setting aside this election on the ground of an offer to bribe these three persons. They received nothing, they did not alter their votes, and I fail to see that clear and distinct offers to bribe, which I think the rules laid down in these cases require, to justify me in finding that they were made as alleged.

During the proceedings there were some other cases referred to, which at some stage of the proceedings seemed to require further explanation, but the further progress of the enquiry served to afford a satisfactory answer, and I have only referred to those cases which were specially adverted to by the petitioner's counsel at the summing up at the close of the case.

I do not think I can better express many of the views that I entertain in relation to this case than by quoting the language of Baron Martin in the *Wigan Case*, 1 O'M. & H. 192, as to the principle on which a judge should act in trying a petition alleging corrupt practices. He says:

"If I am satisfied that the candidates honestly intended to comply with the law and meant to obey it, and that they themselves did no act contrary to the law, and *bona fide* intended that no person employed in the election should do any act contrary to the law, I will not unseat such a person upon the supposed act of an agent, unless the act is established to my entire satisfaction. Things may have been done at an election of which I do not approve—for instance, having committees at public houses, hiring a number of carriages (which now in borough elections is prohibited), or hiring "roughs"—but which do not of themselves avoid an election. They are ingredients which may be taken into consideration, and they may tend to show what was the real quality and meaning of an ambiguous act, which may have one effect or another, according as the judge's mind is satisfied that it was honestly or dishonestly done. It may be that in an election certain acts have taken place which the judge disapproves of, but which do not satisfy him that another act on which the validity of the election depends, was corruptly done. But if upon a future petition ensuing upon another election in the same place, acts similar to those of which the judge had expressed his disapproval, were proved to have been repeated, the judge who tried the second petition might well take them into consideration to aid his conclusion, that the act upon which the validity of the election depended was a corrupt and dishonest act."

I am satisfied that the respondent honestly intended to comply with the law, and meant to obey it, and has done no act contrary to the law, and *bona fide* intended that no person employed in the election should do any act contrary to the law. I have not that clear and satisfactory evidence of acts contrary to law, done by his agents, which will, in my opinion, justify me in declaring the election of the respondent void, and it therefore becomes my duty to declare that the respondent was duly elected.

As to costs, there were no grounds whatever for charging the respondent personally with acts of bribery or other corrupt practices, and the scrutiny was abandoned after some attempts were made to go on with it. The costs as to these parts of the case, I direct shall be paid by the petitioner to the respondent.

As to the other parts of the case, though the respondent is successful, I think the matters were proper to be inquired into in the interest of the public, and as to them I give costs to neither party.

CHANCERY CHAMBERS.

Re Dolsen.

Quieting Titles Act—Statutes—Con. Stat. U. C., c. 83—Effect of a mortgage in fee by a tenant in tail.

It is at least doubtful whether a mortgage in fee by a tenant in tail in possession bars the entail, and whether upon a discharge being executed the mortgagor does not take back his original estate.

[February, 1872.—Mr. Taylor.]

Mr. Taylor, Referee of Titles.—The petitioner is under his father's will tenant in tail in possession of the land in question. He asks, however, a certificate of title as owner in fee simple, subject to a mortgage in fee to one Scane, claiming that the effect of this mortgage is to bar the entail. (Con. Stat. U. C., c. 83, s. 10).

Mr. Leith, in his Real Property Statutes (page 338), respecting a mortgage in fee made by a tenant in tail, says: "On a mortgage in fee the equity of redemption will belong to the mortgagor, not as tenant in tail, but freed of the entail, and descend to the heirs general instead of to the heirs in tail." No authority is cited in support of this statement. Mr. Shelford, when treating of the corresponding clause in the English Statute (Shelford Real Prop. Stat. 350), does not consider this as quite clear. He accordingly says that, "in mortgages in fee, whether of freeholds or copyholds, when it is intended that the equity of redemption shall be discharged from the entail without any further assurance, it will be proper to frame the proviso of the redemption, not so as to make the estate of the mortgagee void on payment of the money, but to direct that he shall re-convey it to the uses intended; for if the condition in the former case should be performed, it might be contended that the tenant in tail became seized of his former estate in tail."

The mortgage in the present case is in the short form under the Statute, 27 and 28 Vict., c. 31; the proviso being that upon payment the mortgage shall be void. The best course for the petitioner to adopt will be to execute a disentailing deed, and thus remove any doubt on the subject.

It may be remarked that even in any case it is doubtful if taking on payment a certificate of discharge under the statute will have the effect of giving the mortgagor an estate in fee simple, the statute saying that such a certificate when registered shall be as valid and effectual "as a conveyance to the mortgagor, &c. of the original estate of the mortgagor."

Scane—Solicitor for the petitioner.

QUEBEC.

Ex parte Papin.

Petitioner for a Writ of Habeas Corpus.

Held—1st. That the powers conferred by the Local Act of the Province of Quebec, contained in section 17 of the 32 Vict., ch. 70, on the Corporation of Montreal for cumulative punishments therein enacted, are unconstitutional.

2nd. That the By-Law of the Corporation of the City of Montreal, imposing a fine *and* imprisonment for the infraction of its provisions against gambling, made under the provisions of the Statute 32 Vict., chap. 70, section 17, passed by the Legislature of Quebec in 1869, is null and void, inasmuch as by the British North America Act, 1867, section 92, sub-section 15, the punishment imposed by Local Legislatures for an offence against its own laws, cannot be cumulative.

[Montreal, 24th Nov., 1871.—In Chambers.]
Drummond, J.

In the Recorder's Court for the City of Montreal, the petitioner was convicted of gambling in a tavern in the city, contrary to the By-Law in such case made and provided, and was condemned to pay a fine of $20 *and* to be imprisoned for two months, and was, in consequence, committed to the common gaol about the 2nd November, 1871. A writ of *Habeas Corpus* was issued, and the case was argued in Chambers. The Counsel for the petitioner, amongst other objections to the conviction and commitment, contended that the Legislature of Quebec exceeded its authority in granting to the Corporation of Montreal, by the Act 32 Vict., ch. 70, sec 17, the powers of punishment for infraction of by-laws more extensive than it possessed itself with respect to offenders against its own laws. By that Local Act the Corporation is vested with the right of imposing a cumulative punishment, fine and imprisonment, whereas the Local Legislature does not possess that right, under the British North America Act, 1867, 30 and 31 Vict., ch. 3, sec. 92, sub-sec. 15.

Drummond, J.—The most important point to be considered is the extent to which the Local Legislature can empower the Corporation to punish by fines, imprisonment or both, parties detected in the infraction of the by-laws. The Local Legislature, under the 32 Vict., ch. 70, 1869, cannot endow Municipal Corporations with powers of punishment for infraction of their by-laws more extensive than it possesses itself. The enactments of the British North America Act, 1867, 30 and 31 Vict., ch. 3, sec. 92, sub-sec. 15, are as follows: "The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Therefore the punishment imposed by Local Legislatures cannot be cumulative; it must be either fine, penalty or imprisonment; it cannot be fine *and* imprisonment. This provision, therefore, limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to Corporations any greater powers of punishment than they possess themselves, so that the 32 Vict., ch. 70, sec. 17, is clearly *unconstitutional* in so far as it assumes to authorize the imposition of punishment by fine and imprisonment for infraction of a by-law of the City of Montreal. This section 17, of the 32 Vict., ch. 70, being the clause relied on to maintain the commitment and conviction in this matter, Papin having been condemned to pay $20 and to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged.

Order for his discharge granted.

ENGLISH REPORTS.

COURT OF EXCHEQUER.

Jones v. Brassey and Ballard.

(Concluded from page 44.)

Channell, B.—I am of opinion that this rule should be discharged. There were three states or conditions of things arising out of the original action; one was the claim of a sum of money, as to which the plaintiff admitted he was satisfied by means of payment, and the credit he gave was proof of payment, so as to dispense on the part of the defendant with the necessity of proving it. There was then another claim, as to which, except as to £65, parcel of it, the defendant pleaded payment, which, if true in point of fact, afforded a defence in point of law. Then there was a third claim with respect to that matter of the £65, which was excepted by the pleadings. The defendant by his pleas denied the whole cause of action except as to £65, and as to £65 there is what is called a *nil dicit*, which is a plea amounting to confession. The plaintiff signed judgment as to the part not pleaded to, and entered a *nolle prosequi* as to that part of the demand which was pleaded to and affected by the two pleas. Now, the plaintiff having brought his second action, the question would arise upon the pleadings, whether or not the sum of money sought to be recovered in the present action, was disposed of by means of the judgment recovered in the first action. It is not unimportant to observe that the entry of a judgment is always considered, (although, in point of fact, it takes place by the action of the attorney,) as the act of the court. The *nolle prosequi* is an entry of the parties; the court cannot, as a general rule, prevent the plaintiff, if he chooses to enter a *nolle prosequi*, from taking that course. Upon the pleadings, as originally framed in this action, the question, I think, would be this: The plaintiff by his replication would have admitted that some judgment, in point of fact, had been recovered between the present plaintiff and the present defendant, whether the causes of action in respect of which that judgment was recovered be the same causes of action or not. There must not only be an identity of particulars, and identity of matter, but it must be matter which was in each case the subject of a judgment; and supposing that the amount for which the *nolle prosequi* was entered can be identified, as upon the evidence here it can be, with the amount sought to be recovered, the case upon the original pleadings would fail in this, that though there was an identity in the subject matter of the claim, there was not an identity in this, viz., that the one subject matter was not identified with the other, because the entry by the plaintiff in the first action of a *nolle prosequi* was not the case of a judgment recovered. Now, taking, as far as we can, a just and equitable view of the case, we relieve the parties from the pleadings, and give them an opportunity of setting up a defence, if they can, without pleadings; and the case then must be looked at as if it was a case stated for the opinion of the court without pleadings. But then we must look at the facts, and see whether, even though there had been no pleas, the facts of the case were such as entitled the plaintiff or the defendant to our judgment. Now, when we dispense with and discard the pleadings altogether, we have no doubt, in point of fact, because it is admitted (and no question arises as to all that was not admitted by the plea of payment), there was a denial as to £65, but as to all beyond £65 there was no denial, and, therefore, discarding the pleadings, it raises the question whether or not a *nolle prosequi* disentitles the plaintiff to recover in a subsequent action in respect of that amount which was the subject of the *nolle prosequi*. I have put two or three instances in the course of the argument, and many others might be cited. A nonsuit does not disentitle the plaintiff to sue in respect of the same matter; and there is another case which is analogous—the case of a *stet processus*, which resembles, in some respects, an entry of *nolle prosequi*, although the *stet processus* is an act of consent between the parties, and the *nolle prosequi* may be, and is, in fact, the act of one of the parties. A *stet processus* does not disentitle the plaintiff to sue in respect of the same cause of action as to which it was entered, unless it can be shown that it was entered under such circumstances as to raise an inference to the contrary. As a matter of evidence it shows no actual bar in point of law. For these reasons I am of opinion that this rule should be discharged, and the verdict must stand for the plaintiff, conditionally, subject to a reference.

Pigott, B.—I am quite of the same opinion. When we get rid of these pleadings the question is, what is the effect of a *nolle prosequi*? As long ago as the year 1789, the court decided that matter in the case of *Cooper* v. *Tiffin*, in which, after action brought and declaration delivered, the plaintiff, on discovering that the defendant was an infant, had entered a *nolle prosequi*, and the defendant thereupon moved to be allowed his costs under the statute of 8 Eliz. c. 2, s. 2, which gives the defendant costs, "if after declaration the plaintiff shall suffer the suit to be discontinued, or otherwise shall be nonsuit in the same," and he contended that the case came within the reason of the statute, and that in practice such costs were always allowed, to which it was answered by the plaintiff, in showing cause, that the case neither came within the words or the reason of the Act of Parliament; the words being only "discontinuance" and "nonsuit," and that there was good reason for not extending the statute to a *retraxit* or *nolle prosequi*, because, by taking three steps, which were active, the parties could not afterwards commence another action for the same cause: whereas, on discontinuing or becoming nonsuit, which are negative, the party is at liberty to bring another action for the same cause, to prevent which the statute was passed. But the court said that the case of a *nolle prosequi* could not be distinguished in reason from a *discontinuance*, for in this as well as that the party might afterwards commence another action for the same cause, and that the practice had been to give costs in such cases: (3 T. 511.) And in the forms given in our books of practice, a judgment upon *nolle prosequi* is the same as it

is upon nonsuit; and, as my brother Channell has just observed, the judgment must be understood to be the act of the court. Then there is another effect which no doubt a *nolle prosequi* may in some cases have, as pointed out by Tindal, C. J., in the case of *Bowden* v. *Horne*, (7 Bing. 716,) namely, where the plaintiff, having accepied a less sum than he originally sued for, and obtained judgment, afterwards enters a *nolle prosequi* as to that for which he did not obtain judgment, and then brings another action—there, as the Lord Chief Justice points out, a *nolle proseyui* as to part, entered up after judgment for the whole, is equivalent to a *retraxit*, and a bar to any future action for the same cause. What, then, is the defendant's answer to the present action? Mr. Powell has cited the case of *Lord Bagot* v. *Williams* (3 B. & C. 275); but, if he had read the judgment of Bayley, J. in that case, he would have found that the facts amounted there, not to a *nolle prosequi* of a part of the plaintiff's claim, but to a mode of taking the judgment of the court, or of the person to whom it was delegated by the court to ascertain what the plaintiff was entitled to, in respect of that for which his action was brought, That was done in this way. The steward who succeeded to the defendant, was called as a witness; the accounts were inveetigated; and then, upon that investigation, an action was directed to be brought for 4000*l.*, and judgment having passed by default, the plaintiff verified for 400*l.* only, because the defendant had not any property in value exceeding that sum. Upon the mode of verifying, Bayley, J. says this: "It was held that the judgment in that action was no bar to his recovering is a subsequent action for goods sold. In this case Lord Bagot, at the time when the first action was commenced, had a demand on the defendant, not for one specific sum of money, but for different sums of money received by the defendant on his account, from different persons, and at different times. His agent knew that he had claims in respect of all the sums now claimed, except 46*l*, and, having that knowledge, he formed an opinion that 3400*l.* was the whole sum which Lord Bagot ought to claim; and if he acted upon that opinion, it is much the same thing as a plaintiff, in a cause at *Nisi Prius*, having a demand of 60*l.*, consisting of three sums of 20*l.*, which became due to him at different times, consented to take a verdict for 40*l.* If the jury, in such a case, at the suggestion of the plaintiff, reduced the verdict to 40*l.*, he would be bound by it, and could not afterwards bring a second action for the other 20*l.* It seems to me thot he is equally bound by his own act in this case as he would have been by the verdict of a jury in the other, and that, having chosen to abandon his claim once, he has done it for ever." Bayley, J. also says that the case of *Seddon and others* v. *Tutop* in 6 Term Rep. 607, which had been cited in argumeut, was distinguishable from the case of *Bagot* v. *Williams*, and he adds that "The ground of the decision in that case was, that no evidence had been given, in the first action, on the count for goods sold and delivered, but that the plaintiff recovered a verdict merely on the count for the promissory note; and it was held that the judgmeat in that action was no bar to his recovering in a subsequent action for goods sold," The case of *Lord Bagot* v. *Williams* is in fact against the present defendant. Upon the whole matter, it seems to me that the ease is plain, ood that the rule should be discharged.

Rule discharged.

UNITED STATES REPORTS.

McClure v. The Philadelphia, Wilmington, and Baltimore Railroad Co.*

Contract between Railroad Company and Passenger—Right of Conductor to put off a Passenger refusing to pay his fare—Agency.

M. on the first of May, purchased a through ticket from N. Y. to B. over the P. W. & B. R. R., and on that day took the through train. The conductor of the train took up the ticket and gave M. a "conductor's check," with the words "good for this day and train only," and with the numerals 5 and 1, showing the month and day, punched out of the "check." M. desiring to leave the train at a way station inquired of some one at the window of the company's ticket office at the station, if the "check" would take him to B. on another train and day, and was told that it "was good till taken up." On the 6th of May, M. entered another train going to B., and being called upon for his ticket, offered the "check." The conductor refused to receive the "check," and M. having refused to pay fare, the train was stopped at a point intermediate between two stations, and, by direction of the conductor, M. left the train.

Held: 1. That M. had no right to leave the train at the way-station, and afteward to enter another train and proceed to his original point of destination without procuring another ticket, or paying his fare.

2 That on the refusal of M. to pay his fare, the conductor had the right to put him off the train, using no more force than was necessary to affect his removal, and was under no obligation to put him off at a station.

3. That even if the person by whom M. was told that the "check" was good until taken up was an agent of the company, the presumption is, that a ticket agent at a way-station has no authority to change or modify contracts between the company and through passengers, and the *onus* of rebutting this presumption rested on M.

Appeal from the superior court of Baltimore city.

The facts are given in the opinion of the court.

At the trial below, the plaintiff ordered the following prayers:

1. Even should the jury find from the evidence that the conductor of the train in question had a right, under the regulations of the company and the contract made with the plaintiff, should they find such contract, to put the plaintiff off the train in question, the plaintiff is entitled to recover, if they find that in so doing, he acted in an unwarrantable manner, as to time or place or mode thereof.

2. That even should the jury find from the evidence that the plaintiff would have been confined, by the terms of his ticket, to the particular train on which he then was, still, if they further find that before leaving said train, the plaintiff as a matter of precaution, inquired of an authorized agent of the company whether he would be permitted to lie over under the check he then held, and was informed that "he would be," that said check was good until taken up, then the fact of his ticket or check having contained any such instruction would not, of itself, prevent the plaintiff from recovering.

3. Even should the jury find from the evidence that the conductor of the train in question had a

* Court of Appeals of Maryland, to appear in 34 Maryland.

right to put the plaintiff off, the plaintiff is entitled to recover if they find from the evidence that in so doing the conductor required him to leave while the train was in motion, or put him off at a place where there was no station.

4. Even if the jury should find from the evidence that the conductor of the train in question had a right to put the plaintiff off, the plaintiff is entitled to recover, if they find from the evidence that in so doing the said conductor put him off at a place where there was no station or house near at hand, or any adjacent place for shelter or food, or at any unusual place.

The following instruction was asked by the defendant:

If the jury shall find from the evidence that the plaintiff, on the 1st day of May, 1867, purchased at New York, a through ticket from that place to Baltimore, over the New Jersey Railroad and P. W. & B. Railroad, and on that day proceeded on his journey as far as Perryville, on the last-named road, where he left the train; and if the jury shall further find that after passing Philadelphia, the then conductor of the train took up said through ticket and gave plaintiff the check in lieu thereof, which has been offered in evidence; and if the jury shall further find that the plaintiff, on the 6th day of said May, got upon the defendant's train for Baltimore at Havre-de-Grace, and the then conductor refused to take said check, but informed the plaintiff that he must pay his fare to Baltimore, or he would be obliged to stop the cars and put him off, and that the plaintiff refused to pay said fare, and the said plaintiff was then put off, then the plaintiff is not entitled to recover in this case, provided the jury shall find that no more force than was necessary was used in putting said plaintiff off the train, even if the jury shall further find, that on arriving at Perryville on the train, on the said 1st day of May, the plaintiff inquired from a man at the window of the ticket-office of the defendant at that place, whether said check would be good to take him on to Baltimore another day, and was told by said man that it would.

The court rejected the first, second and third prayers of the plaintiff, and granted the fourth, as also the prayer of the defendant. The plaintiff excepted to the ruling of the court in rejecting his prayers, and granting the prayer of the defendant, and the verdict and judgment being against him, he appealed.

The cause was argued before Bartol, C.J., Stewart, Maulsby, Grason, Miller and Alvey, JJ.

Albert Ritchie for the appellant, cited the following authorities: *Balt & O. R. R.* v. *Blocker*, 27 Md. 277; *Goddard* v. *Grand Trunk R. R.*, 10 A. L. R. 17; *Terre Haute A. & St. L. R. R.* v. *Vanatta*, 21 Ill. 188; *Du Laurans* v. *St. P. & P. R. R.*, 15 Minn. 49; *Holmes* v. *Wakefield*, 12 Allen 580; *Sanford* v. *8th Av R. R.*, 23 N. Y. 343.

Thomas Donaldson, for the appellee, referred to *Balt. C. Pass. R.* v. *Wilkinson*, 30 Md. 224; 2 Redf. on R. 219; *C. C. & C. R. R.* v. *Bartram*, 11 Ohio 457; *Cheney* v. *B. & M. R. R. Co.*, 11 Metc. 121; *Beebe* v. *Ayres*, 28 Barb. 275; *Johnson* v. *Concord R. R.*, 46 N. H. 218; *State* v. *Overton*, 4 Zab. 435.

Grason, J., delivered the opinion of the court.

At the trial of this case in the court below the plaintiff offered four prayers, the last of which was granted and the others were rejected; and the defendants offered one prayer which was granted. The plaintiff excepted to the rejection of his first three prayers and to the granting of the defendants' prayer, and the judgment being against him, he has taken his appeal.

The first question to be considered is, whether a person who has purchased a through ticket from New York to Baltimore, taken his place in a train, and entered upon his journey, has the right to leave the train at a way-station on the route, and afterward to enter another train and proceed to his original point of destination without procuring another ticket or paying his fare from the station at which he again enters the car. We think it clear that he cannot.

The contract between the parties is, that upon the payment of the fare the company undertakes to carry the passenger to the point named, and he is furnished with a ticket as evidence that he has paid the required fare, and is entitled to be carried to the place named. When the passenger has once elected the train on which he is to be transported, and entered upon his journey, he has no right, unless the contract has been modified by competent authority, to leave the train at a way-station and then take another train on which to complete his journey, but is bound by the contract to proceed directly to the place to which the contract entitled him to be taken. Having once made his election of the train and entered upon the journey, he cannot leave that train, while it is in a reasonable manner in the undertaking of the carrier, and enter another train without violating the contract he has entered into with the company. "A contrary doctrine would necessarily impose the carrier additional duties, the removal of the passenger and his baggage from one train to another, and the consequent additional attention on the part of the company; also an increased risk of accidents, and a hindrance and delay, not contemplated by a reasonable interpretation of their undertaking." *C. C. & C. R. R. Co.* v. *Bartram*, 11 Ohio, 463; *State* v. *Overton*, 4 Zab. 438; 2 Redf. on Railways, 219.

In the case now under consideration the appellant, on the 1st day of May, 1867, purchased a through ticket from New York to Baltimore, and on that morning took his place in the through train and entered upon his journey, and some miles south of Philadelphia his ticket was taken up, according to custom, by the conductor of the appellees' train, who gave him in its stead what is called a "conductor's check," with the words "*good for this day and train only*," printed upon one side, and a list of stations and numerals on the other; the numerals indicating the months and days of the month. The numerals 5 and 1 were punched, showing that the conductor's check had been used on the appellees' train, on the 1st day of May. It is clear, therefore, that the appellant had notice that the check, thus delivered to him in the place of his ticket, could be used only on that day and train. When the train arrived at

Perryville, the appellant, desiring to go to Port Deposit to remain a few days, sought the conductor for the purpose of ascertaining from him whether the conductor's check which he held would take him to Baltimore on another day and train. Not finding the conductor, he asked a person whom he saw standing at the window inside the ticket office of the appellee at that place, and was informed by him that it "was good till taken up." The appellant entered another train of the appellee on the 6th day of May, at Havre-de-Grace, having a Mrs Taylor in his company, and after proceeding some distance was called upon by the conductor for his ticket. He handed him Mrs. Taylor's ticket, procured before entering the train, and the conductor's check which he had received from the other conductor on the 1st day of the month. He was told by the conductor that the check was not good, and that he must give a ticket or pay the fare. The appellant then explained to the conductor what had occured at Perryville five days before, and that the agent there had informed him that the check was good until it was taken up The conductor again said that it was not good, and that the appellant must give him a ticket or pay his fare or be put off the train. The appellant still declining to pay, the conductor rang the bell to stop the train, and either after the train had stopped, or when it had nearly stopped, and was moving very slowly, the conductor either beckoned or nodded his head to the appellant, who immediately left his seat, went to the platform of the car and stepped off the train. He then walked to Aberdeen, two and a half or three miles off, purchased a ticket and took another train of the appellees three or four hours afterward, and went to Baltimore. The appellant and Mrs. Taylor both testified that the conductor seemed to be very angry and excited; that they thought so from the violence with which he pulled the bell-rope to stop the train. The conductor testified that he controlled the train by the bell-rope, and that it was always necessary to pull it violently to insure the ringing of the bell, and, in long trains, to take up the slack of the rope. There is no proof of any anger or excitement whatever, except as regards the manner of pulling the bell-rope. There is some conflict in the evidence as to the fact whether the train had stopped when the appellant left it; but be this as it may, it is certain that it was moving very slowly at the time. The bell had been rung to stop the train; it would no doubt, have come to a full stop, if the appellant had waited a moment longer before getting off. The conductor used no force whatever to put him off; did not require him to get off while the train was in motion, and did not touch or say a word to him. It therefore appears that if the appellant did leave the train while it was in motion, that he did so voluntarily and without injury to himself. Upon the refusal of the appellant to pay his fare to the conductor he had the undoubted right to put him off the train, using no more force than was necessary to effect his removal, and the proof shows that he used none whatever. We cannot concur in the doctrine contended for by the counsel of the appellant, that a passenger, having no ticket and refusing to pay his fare, can only be put off at some *station* on the road. The establishment of such a principal would result in compelling railroad companies to carry a passenger to the station next to the one at which he entered the train, which might, and doubtless would, often turn out to be the very point to which he desired to be taken, and if the passenger were unknown to the conductor the company would be without remedy.

It is claimed, however, that the appellant was authorized by the information received from the agent of the appellees at Perryville, to use the conductor's check received by him on the 1st day of May, and, therefore, that it was unlawful to compel him to leave the train. There is no evidence to prove that the person from whom the appellant received the information was an agent of the appellee. But even if there were proof to establish that fact, the presumption is, that a ticket agent at a way-station has no authority to change or modify contracts between the company and its through passengers, and the *onus* of rebutting such presumption rests upon the appellant; but upon this point he offered no proof whatever. The check held by the appellant showed upon its face that it was good on the 1st day of May only, and upon but one train on that day, and the prescribed numerals showed to the conductor to whom it was offered that it had been used on that day; the conductor had, therefore, the right to reject it, and to require the appellant to furnish a ticket or pay his fare, and, upon his failure to do either, to compel him to leave the train.

There was no evidence to show that any violence whatever was used in effecting his removal from the train, or that he was compelled to leave it at an improper time, and the first three prayers of the appellant were properly rejected; the fourth, which was granted, having left it to the jury to find whether his removal from the train was at an unusual or improper place. The appellee's prayer fairly presented the law of the case to the jury, and it was properly granted. There being no error in the rulings of the court below, its judgment will be affirmed. *Judgment affirmed.*

Maulsby, J., dissenting.

REVIEWS.

The Canadian Monthly. Adam, Stevenson & Co.: Toronto.

We are glad to find in this periodical a steady improvement as regards the character and variety of its contents, and rejoice to be informed by the publisher that its continuance is no longer experimental, and "that its permanent establishment is now assured." In the April number now before us, we find something like a style of its own, such as pertains to all magasines which have a recognized place in the literary world. The principal topics of the day are treated of in an impartial and judicial spirit, which con-

trasts most favourably with the heated and acrimonious partizanship of the daily Press. An article on "The Late Session" of the Ontario Parliament, by "a Bystander," is politically fair, historically instructive, and is evidently the production of one who has studied political and constitutional questions in a higher school than we regret to say is afforded by the proceedings of any Colonial Legislature. In his opening remarks, "a Bystander" pleads for the incognito of writers for the Press. Would that all writers for the Canadian Press refrained as punctiliously as he does from "all abuse of the privileges of an anonymous writer." We should like to know why the principle here laid down as most conducive "to the moral influence of the Press" is not adopted by all the writers for *The Canadian Monthly*. It is well for a writer to be known by his style, but not so well for his article to be known by his name being attached to it. The former is a distinction won by the intrinsic merits of the writing, the latter is very likely to cause the writing to be estimated according to our preconceived ideas of the personal character of the writer. "A Bystander" suggests the evils likely to arise in our Provincial Legislatures from the existence of party government not based upon party principles, and his observations on this point are worthy of consideration. The evil already exists in a palpable degree, but the remedy is not so easily pointed out.

The legal interpretation of the Treaty of Washington is given in very clear terms by a Barrister of Ontario. The more this matter is discussed, the more arrogant and grasping does the conduct of the American Government appear. The most ardent philo-Americans will see what waste of good material it is to treat with the public men of Yankeedom as though they were gentlemen.

"The Romance of the Wilderness Missions" and "Old Colonial Currencies" are well written historical sketches relating to "old times," though on very different subjects. We hope to see the first of these subjects continued in some future number.

The departments of poetry and fiction in this number are fairly filled, though the poetry is not equal to the other matter. As we have had occasion to remark before, the Book Reviews form a most valuable part of the contents.

The Relation and Duty of the Lawyer to the State: Baker & Godwin, New York, 1872.

This forms the subject of a lecture delivered by Henry D. Sedgwick, before the Law School of the University of the City of New York. The theme was no doubt suggested by the scandalous mismanagement of public affairs in that city, although the lecturer profits by the occasion to give his audience the benefit of a wide extent of reading and much thoughtful observation upon the proper functions of a lawyer among the community in which he lives. In our judgment he does not attach sufficient importance to the legal element in English affairs. He speaks as if the whole profession were in a state of subservience to the Lord Chancellor, and as if the people were without appeal from that high functionary, who technically keeps the conscience of the state. But at the present day the Lord Chancellor is controlled, as well by the force of legal as by that of public opinion. The time will be remembered when Lord Chelmsford was constrained to change some appointments he had made by reason of the unpopularity of his nominees. There was again the time when Lord Campbell was taken to task in the House of Lords for his appointment of the *quondam* reporter, Mr. Blackburn, to the judicial office which he has so ably filled. A similar occurrence has taken place with respect to the appointment of Sir Robert Collier to the Judicial Committee within the last few month; which we refer to at length in another place, while the constrained resignation of Lord Westbury proves the force of a public morality that will be looked for in vain among any of the United States. Again, it is often overlooked that the Lord Chancellor cannot claim the highest legal patronage in the realm. The disposal of the Chief Justiceship of the Queen's Bench belongs to the Premier of England, while the Attorney-General, at the time of vacancy, can claim for himself the dignity of Chief in the Common Pleas.

The lawyer has as important a work to do in this country as devolves upon him in the adjoining republic. From the ranks of lawyers our greatest men are draw; our ablest statesmen; our best parliamentarians, and law-makers. In all public matters the lawyers are relied on as the men to speak, and act, and write. These lawyers hands and heads

are all needed for the general service of the community. It is for them to know that it is their duty to render such service in the best and honestest way, feeling with Sir Edward Coke, that they are owe the debt, not to their profession only, but also to their country.

This *brochure* will, in this view, be of value to the Canadian lawyers. The author has done his work well, and casts no discredit on the name of Sedgwick, already illustrious in legal literature.

Ewart's Index of the Statutes.

We noticed the receipt of this Index some time ago, but had not space then to do more. It is, however, worthy of more than a passing notice, seeing that it is becoming of daily reference in lawyers' offices.

The title page declares it to be an alphabetical index of all the public statutes passed by the legislatures of the late Province of Canada, the Dominion of Canada, and the Province of Ontario, subsequent to the consolidation, and down to and inclusive of the year 1871. That such an index was wanted is not likely to be disputed; nor can it be denied that Mr. Ewart has most successfully come to the rescue. His work has been well done and on an intelligent plan. We trust the encouragement given to him will be sufficient to induce the editor to republish the index yearly, or every two years at least. The startling rapidity with which our laws are changed now makes everything which assists us in keeping track of the alterations most acceptable.

The *Albany Law Journal* in speaking of the Alabama Claims remarks that "The beauties of pleading under the old system are finely illustrated in the proceedings thus far under the so-called Alabama treaty. The United States have prepared, for use before the joint high commission, what is analogous to a declaration in common-law practice. For fear that they will be thrown out of court, or something else, they complain of every imaginable matter, whether they hope anything from it or not. In a multitude of counts there is safety, seems to be the motto of the American pleaders. Of course the defence pleads the general issue, and this is as the parties can get before the trial comes on. All persons familiar with the ways of the common-law lawyers measure the cases published at their true value. The great misfortune is that the public on both sides of the water, not being familiar with legal fictions outside of the courts, are misled, and this misfortune is aggravated by partizans who are anxious to embarrass government action, both in the United States and England."—*Law Times.*

APPOINTMENTS TO OFFICE.

SHERIFF.

JAMES GILLESPIE, of the Town of Picton, Esquire, to be Sheriff of and for the County of Prince Edward, in the room and stead of Absolom Greeley, Esquire, resigned. (Gazetted March 23rd, 1872.)

ASSOCIATE CORONERS.

JOHN SOMERVILLE TENNANT, Esquire, M.D., for the County of Huron. (Gazetted Jan. 27th, 1872.)

JAMES A. SIREWRIGHT, Esquire, M.D., for the County of Essex. (Gazetted Feb. 17th, 1872.)

THOMAS KIEMAN, Esquire, M.D., for the County of Simcoe.

DONALD McDIARMID, Esquire, M.D., for the United Counties of Stormont, Dundas and Glengarry.

HERMAN L. COOK, Esquire, M.D., for the United Counties of Lennox and Addington.

WILLIAM HIGINBOTHAM, Esquire, M.D., for the County of Peterborough. (Gazetted Feb. 24th, 1872.)

GEORGE CARSON McMANUS, Esquire, M.D., for the County of York.

JAMES KENNEDY, Esquire, M.D., for the County of Gray. (Gazetted March 9th, 1872.)

JAMES W. SMITH, Esquire, M.D., for the County of Ontario.

JAMES RAE PATERSON, Esquire, M.D., for the Connty of Bruce

GEORGE MITCHELL, Esquire, M.D., for the County of Kent. (Gazetted March 16th, 1872.)

THOMAS HENRY THORNTON, Esquire, M.D., for the County of Prince Edward. (Gazetted March 23rd, 1872.)

HAWTRY BREDIN, Esquire, M.D., for the County of Prince Edward.

ALEXANDER HECTOR BEATOK, Esquire, M.D., for the County of Simcoe.

JAMES ACLAND DE LA HOODE, Esquire, M.D., for the County of York. (Gazetted March 30th, 1872.)

PETER McDONALD, Esquire, M.D., for the County of Norfolk. (Gazetted April 6th, 1872.)

SYLVESTER LLOYD FREEL, Esquire, M.D., for the County of York. (Gazetted April 13th, 1872.)

SAMUEL BLYTH SMALL, Esquire, M.D. for the County of Huron. (Gazetted April 20th, 1872.)

NOTARIES PUBLIC FOR ONTARIO.

WILLIAM A. FOSTER, and ARTHUR H. SYDERE, and WILLIAM McDONALD, of the City of Toronto, Esquires, Barrister-at-Law. (Gazetted Jan. 13th, 1872.)

FRANCIS S. SEVENSON, of the Village of Dunnville, Gentleman, Attorney-at-Law. (Gazetted Feb. 24th, 1872.)

GEORGE A. CONSITT, of the Town of Perth, Gentleman, Attorney-at-Law. (Gazetted March 9th, 1872.)

DANIEL HENRY MOONEY, of the Town of Prescott, Gentleman, Attorney-at-Law. (Gazetted March 16th, 1872.)

WILLAM P. LAIRD, of the Village of Strathroy; RICHARD AUSTIN BRADLEY, of the City of Ottawa; CHARLES JOHN FULLER, of the Town of Simcoe, and BEVERLEY JONES, of the City of Toronto, Attorneys-at-Law. (Gazetted March 23rd, 1872.)

JOHN O'DONOHOE, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted March 30th, 1872.)

COUNTY ATTORNEY.

RUPERT MEARE WELLS, of the city of Toronto, Esquire, Barrister-at-Law, to be County Attorney in and for the County of York, in the room and stead of John McNab, Esquire, deceased. (Gazetted March 30th, 1872.)

CLERK OF THE PEACE.

THOMAS HENRY BULL, of the City of Toronto, Esquire, Barrister-at-Law, to be Clerk of the Peace in and for the County of York, in the room and stead of John McNab, Esquire, deceased. (Gazetted March 30th, 1872.)

DIARY FOR JUNE.

1. Sat... Open Day.
2. SUN.. *1st Sunday after Trinity.*
3. Mon.. Paper Day, Q. B. New Trial Day, C. P.
4. Tues.. Paper Day, C. P. New Trial Day, Q. B.
5. Wed.. Open Day, Q. B. New Trial Day, C. P.
6. Tues.. Open Day.
7. Fri... New Trial Day, Q. B. Open Day, C. P.
8. Sat... Easter Term ends.
9. SUN.. *2nd Sunday after Trinity.*
11. Tues.. General Sessions and County Court Sittings in each county.
14. Fri... Last day for Courts of Revision finally to revise assessment roll.
16. SUN.. *3rd Sunday after Trinity.*
20. Thur. Accession of Queen Victoria; 36th year of her reign commenced.
21. Fri... Longest Day.
23. SUN.. *4th Sunday after Trinity.*
29. Sat... *St. Peter.*
30. SUN.. *5th Sunday after Trinity.*

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THE

Canada Law Journal.

JUNE, 1872.

An Act has been passed by the Pennsylvania Legislature, extending the competency of persons to be witnesses in criminal cases. It provides that in proceedings where the crime is not above the grade of misdemeanor, the person charged shall, at his own request, but not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, or comment made upon, such neglect or refusal, by the counsel in the case, during the trial. Proceedings in forgery and perjury are excepted from the operation of the Act.

Statutes similar to this are already in force in some of the other States; for example, New York and Maine. Attempts have been made, chiefly by Lord Brougham, to introduce such a law into the English system, but hitherto in vain. We should like to know how the clause which lays it down that "no presumption shall be created against any person withholding his testimony," is to be carried out practically. It would puzzle even the traditional "Philadelphia lawyer" to prevent such a course of conduct from raising a prejudice in the mind of the jury against the person incriminated. We apprehend, however, that no serious injury will result in such a case, as almost every innocent person will seize the opportunity of clearing himself upon oath. Much might be said both for and against this enlargement of the law of evidence, but it is not necessary now to dwell upon the subject.

Lawyers are often blamed by their clients for giving wrong opinions on points of law, or rather for expressing views which are not sustained when the cases come before the courts, and this, in the minds of the suitor, means the same thing. We should recommend complaining litigants to read the judgment of the Court of Appeal in *Forsyth* v. *Galt et al.*, where a question arose on the construction of a will as to the estate taken under it by a devisee, one C.

It was held by Draper, C. J., and Gwynne, J. that the gift to C. was an estate in fee simple, subject to an executory devise over in the event of his dying without issue; by Wilson, J., and Morrison, J., that C. took a fee simple absolute; and by Strong, V. C., that C. took an estate tail, with remainder over in the event of his dying without issue.

There would be, however, the advantage in this case, that it would be scarcely possible to have given an opinion that would not have received the support of at least *some* of the Judges on the Bench.

The following are the principal Bills of interest to the profession, which have, so far, been brought before the House of Commons this session: An Act to extend the right of appeal and new trials in criminal cases; an Act to repeal the Insolvent Acts, and an Act to amend the Insolvent Act of 1869; an Act to amend the Acts respecting the duties of Justices of the Peace out of sessions in relation to summary convictions and orders; an Act to amend the criminal law relating to violence, threats and molestations; an Act to correct a clerical error in the Act respecting malicious injuries to property, by striking out the word "not," in the last line but two of the third section; an Act for the avoidance of doubt respecting larceny of stamps; an Act to set at rest doubts as to the maturity of a note dated on the last day of a month, and payable at a month or months after date; an Act to extend the law as to the carrying of dangerous weapons; an Act respecting Trade Unions; an Act respecting Patents of Inventions, &c.

EQUITY IN COMMON LAW COURTS.

When Sir John Richard Quain was lately called to the dignity of Serjeant-at-law, preparatory to his elevation to the Queen's Bench, he gave rings with the motto, "*Dare, facere, præstare.*" Inasmuch as Mr. Quain was one of the most active and efficient members of the Judicature Commission, the English *Law Journal* predicts that his adoption of the motto of the Roman *prætor* indicates that he expects to administer equity as well as law. A marvellous prospect this, as compared with a characteristic scene of former days, when Erskine's joke pretty fairly represented the value of equity in the eyes of common law men. On one occasion, when Lord Kenyon, after deciding against the plaintiff's action, observed that he might resort to a court of equity for relief, Erskine was heard to ejaculate, in a tone of inimitable simplicity, "My Lord, would you send a fellow-creature there?" The spirit of Erskine is still alive, though without such justification as he had, among the common law Bench and Bar. Division of jurisdiction, leaving the two systems of law and equity to run in distinct channels, will, at least until a perfect system of fusion is discovered, secure more satisfactory results than the turbid admixture which even now is manifest as a result of the equitable clauses of the Common Law Procedure Acts. Judging by the experience of the past, the administration of law and equity by one and the same court, and by one and the same set of judges, is not very encouraging. When the English Court of Exchequer possessed equity jurisdiction, it was of all courts the most unsatisfactory, so far as the causes on the equity side were concerned. The ability of even an Alderson was taxed to the uttermost to fulfil the diverse duties devolving upon him; and it is not to be expected that by Darwinian or other selection, there will be a succession of such Judges in new courts of multifarious jurisdiction. The constitution of our own Court of Error and Appeal, where a preponderance of common law Judges entertain appeals from the Court of Chancery, is another and nearer example of the unfairness of submitting pure questions of equity to a common law tribunal.

Our attention has been called to this subject by the case of *Shier* v. *Shier*, 22 C. P. 147, where, upon the validity of an equitable plea, Mr. Justice Gwynne dissented from the other two members of the court. Ever since the right to plead equitably at law has been given, the majority of common law Judges have sought to restrict the right within the narrowest bounds and by the sheer weight of numbers, not of reason, they have prevailed. It is now, it seems, a cast-iron rule in England that a plea on equitable grounds can only be supported at law in cases where a court of equity would, under similar circumstances, decree an absolute, unconditional and perpetual injunction. Yet at the first, such Judges as Jervis, C. J., and Crowder, J. (in *Chilton* v. *Carrington*, 16 C. B. 206; and see S. C.

3 Com. L. R. 606), raised their voices in dissent, and in favour of a more liberal construction of the statute. In this Province, Mr. Justice Gwynne may be ranked among the number of able dissentients who have been outnumbered by their judicial brethren. Yet professional opinion is in favour of the minority. We cite what is perhaps the most remarkable expression of this opinion from an able article published in the *Law Magazine*, vol. vi. N. S. 252, part of which is as follows:

"The admission of equitable pleas and replications was the result of a laudable desire to save expense to both parties in cases wherein a suit at law would certainly be stopped in equity—in a word, to make the principles of one tribunal co-operative with, and no longer antagonistic to, the other. The words of the Act on this subject are large enough to let in any defence which shows matter for injunction; but the alleged necessity, or rather supposed convenience of the case, has induced the Judges to limit equitable defences to those cases in which the plea shows that an injunction absolute and unqualified would be granted in equity against the prosecution of the suit; but wherever something more would have to be done in equity than staying the action—as for instance a reforming of the contract, or taking an account—the courts of law have refused to allow an equitable plea, because they say that they have no machinery for working complete justice. If there be no machinery, however, it could be supplied readily and naturally by a proper development of the Master's office. At present, by repudiating the powers which were given to them, that they may do complete justice in any cause, the courts have either stultified the meaning of those who designed the provision for equitable jurisdiction, or have evaded a duty."

Shier v. *Shier* was an action for breaches of covenant in a farming lease. The covenant, as drawn, provided that the defendant should, during the term of five years, use in a proper manner upon the demised premises all the straw which should be raised thereon, and that he should not cut any standing timber, except for rails, buildings or firewood; and that he should not allow any timber to be removed from the demised premises. The defendant's pleas, on equitable grounds, were in substance that before the execution of the lease, the agreement of both parties was that the defendant should be allowed to remove straw from the demised premises to his own lot adjoining, provided he should use on the demised premises every second year, all the manure made on his own farm and the demised premises; which term, as to the manure, was expressed in the covenant: that through error of the conveyancer who acted as agent for both parties, and by mutual mistake, it was omitted to limit the covenant as to the straw; and that one of the alleged breaches was the defendant's removing the straw to his farm adjoining: that as to the timber, it was the agreement, &c., that the defendant should be allowed to cut down standing timber on the demised premises to burn at his own house on the farm adjoining, and that by mistake of the said conveyancer, he omitted to qualify the covenant accordingly, and the alleged breach was occasioned by the defendant cutting and removing wood from the demised premises for his own house on the farm adjoining. The majority of the court held, upon demurrer, that as the term was still current and the contract executory, complete justice could not be done between the parties in a court of equity without a reformation of the covenant, which, as a court of law, they had no power to enforce. Gwynne, J., dissenting, held that complete justice could be done between the parties to that action without any reformation of the covenant.

Admitting that the weight of authority is with the majority of the court, as they state the case, yet in one point of view they seek to be more equitable than the Court of Chancery itself. The effect of a reformation of the covenant would be to limit it, to curtail the plaintiff's legal rights in such a way that it is not supposable he would ask as a condition of relief, upon bill filed to restrain his action, that the covenant should be reformed. The covenant as it stands covers every stipulation intended to be made between lessor and lessee, and something more: the suit is in respect of that something more, which it is admitted is an unjust claim. The covenant as it stands protects the lessor against every possible breach by the lessee both in respect to what was agreed between them, and as to other matters not so agreed. It would not benefit the plaintiff to have the covenant reformed as to these other matters; it would not in any way enable him more effectually to assert his proper rights in any subsequent suit.

Under these circumstances, it is manifest that a court of equity would restrain the suit

in question; but it is not at all manifest that the lessor would ask a reformation of the unlimited instrument, or that a court of equity would impose a reformation upon him "in spite of his teeth," to use the vigorous judicial expression of Ventris, J., in *Thompson* v. *Leach*, 2 Ventr. 206. This point is adverted to by Gwynne, J., when he says, "for the doing which (*i. e.*, the reformation by a court of equity), for any practical purpose, no actual necessity appears to exist" (p. 159). On this point we should like to see the case go to appeal; but perhaps "*la jeu ne vaut pas la chandelle.*"

NEW TARIFF OF FEES.

It is not as a matter of information, but rather historically, that we refer to the new Common Law tariff of fees. It had long been thought that the former tariff, which was well enough in its way, many years ago, was simply absurd when looked at with reference to the increased price of everything, and the expense of living in these days. There has been an advance in everything except fees to lawyers; and to make things worse for them, much of the routine business, done formerly by professional men, has fallen into the hands of "conveyancers," (save the mark!) "collectors," "agents," *et hoc genus omne.* The Insolvent Acts have also done away with a large and lucrative class of business, the profits of which now go to make fat official assignees. We shall not pause now to discuss the folly of lawyers allowing themselves to be robbed by these unprofessional and unlicensed "spoilers," nor the helpless docility of creditors, who see their debtors' estates eaten up by the bills of official assignees before their eyes. But the result is that nothing is left to the profession but *special* business. This is paid for at prices that were considered fair for *routine* business that a junior clerk could do, when one's yearly expenses were less than half what they are now.

The old tariff was drawn up with apparently the most hazy ideas as to the practical working of it, though this may have been the result partly of the transition from the old practice to the new, and consequent uncertainty of it. The taxing officers, or at least some of them, did not mend matters, as they seemed to be under the impression that they were appointed, not to give a fair and reasonable interpretation to the tariff, but to cut down fees under every possible excuse by virtue of strained and impossible readings of the tariff. They were assisted in this by the ingenuity of smart managing clerks and short-sighted attorneys, striving to cut down their opponents' bills of costs.

Some time ago several energetic members of the profession, both in town and country, familiar with the subject, and knowing, from an extensive practice, the defects and unfairness of the old tariff, met together and drafted a new tariff of fees, which was submitted to the Judges. Their lordships responded to the appeal with much courtesy; but feeling themselves placed, as it were, between the public and the profession, thought it their duty to make some alterations in the proposed tariff, and to cut down some of the charges. We are not prepared to say that the changes which have been made make a perfect tariff; but it is a decided improvement upon the old one both in arrangement and in detail, and will be looked upon as a boon to an ill-paid class, whilst the public have been protected from those whom they affect to look upon as their natural enemies.

The new tariff speaks for itself. In some respects it is still defective, witness for example, the omission of any provision as to fees to professional men, surveyors, &c. This arose, we understand, from an omission by the person who copied for the printer the tariff as settled by the judges. This, however, is immaterial, as the old tariff can be looked to to supply the omission. The new tariff will not affect any business done before the 20th day of May, being the first day of this present Easter Term.

We are glad to say that the taxing-masters at Toronto have so far shown a desire to read and interpret it according to its "true intent and meaning" as a remedial measure, and therefore to be construed liberally in favor of those for whose benefit the changes were made. We trust practitioners, proverbially so careless of their own interests, being themselves officers of the Courts, will act as fairly to their brethren on taxation, as they do to their clients. More we do not want; but that we are entitled to.

COUNTY COURT APPEALS.

In cases of appeal from the County Court, we observe that the Court of Queen's Bench, in *Eddy* v. *The Ottawa City Passenger Railway Co.*, 31 U. C. Q. B. 569, have laid down two important rules of practice, one of which is new, the other old enough to be better observed than it seems to be. The Court has again declared that in future appeals will not be heard unless the grounds of appeal are entered on the appeal books when delivered. This rule should now possess great cumulative force, as it was first brought prominently into notice in *Smith* v. *Foster*, 11 C. P. 163; afterwards in *Portman* v. *Patterson*, 21 U. C. Q. B. 237; and its effect suspended, as a last act of grace, in *Severn* v. *Toronto Street Railway*, 23 U. C. Q. B. 254. Still the profession had better not presume any further upon the clemency of the Bench. Although the Judges are extremely unwilling to punish the client for the carelessness of his attorney, yet, on principle, it is better that a few individuals should suffer than that the regulations of the Court should be persistently disregarded. Perhaps the better course would be for the officer of the Court who receives the appeal books and enters the appeal, to reject all books not in proper form.

The new practice of allowing such appeals with costs is a beneficial change, which we are glad to see adopted in this country. Such is the almost universal English practice; and we take it to be extremely reasonable, in all cases of appeals from inferior Courts, as well as from subordinate judicial officers of the superior Courts, that costs should, in all but certain exceptional cases, follow the result. Besides the authorities given in the note to 31 U. C. Q. B. p. 576, the following cases may be referred to as showing the rule of the common law Courts in England: *Taylor* v. *Great Northern Railway*, L. R. 1 C. P. 430 (costs should be asked when the appeal is disposed of; an application afterwards will not be entertained, unless, perhaps, it be made during the term); *Budenburg* v. *Roberts*, L. R. 2 C. P. 292.

When the Chamber order of a Judge is successfully appealed from to the Court, costs are never given on setting aside the order, out of deference to the Judge's opinion: *Baylis* v. *LeGros*, 2 C. B. N. S. 332, per Cresswell, J.

SELECTIONS.

CHANGING THE VENUE.

The case of *Church* v. *Barnett and another*, reported in the May number of our Reports (40 Law J. Rep. (N.S.) C. P. 138), enables us to offer some comments on the practice of changing the venue in actions at law, at the instance of the defendant—comments rendered necessary by the conflict of opinion hitherto expressed on the subject, and by the inaccurate statements put forward in "Chitty's Archbold's Practice." Before the year 1853, if the plaintiff brought a transitory action in any other county than that in which the cause of action arose, the defendant, upon an affidavit "that the plaintiff's cause of action (if any) arose in the county of B. and not in the county of A." (where the action was brought), "or elsewhere out of the said county of B." could have the venue changed, as of course, to the county where the cause of action really arose. This affidavit, which was called the common affidavit, was sufficient in the great majority of actions, but there were certain actions in which special reasons for changing the venue had to be shown by a defendant. Where the plaintiff laid the venue in the county where the cause of action arose, an order for changing it would only be made where it was clearly made out, either that the defendant could not have a fair trial in the county, or that an immense saving of expense would be achieved by the change sought. Then came Rule 18, Hilary Term, 1853, in these words: "No venue shall be changed without a special order of the Court or judge, unless by the consent of the parties." The intent and meaning of this rule was discussed on June 10 in the same year in *De Rothschild* v. *Shilston*, 8 Exch. 503, 22 Law J. Rep. (N.S.) Exch. 279. In the argument of that case, Baron Parke said that the new rule was intended to put a stop to the practice of changing the venue, as a matter, of course by a sidebar rule, and of bringing it back again by an undertaking to give material evidence; and that, according to the rule, no venue could be changed except upon special application to a judge. Mr. Justice Willes was counsel on one side in *De Rothschild* v. *Shilston*, and the present Attorney-General was counsel on the other side. Mr. Willes had obtained a rule *nisi* to rescind an order of Baron Platt for changing the venue from London to Devonshire, the order proceeding merely on an affidavit that the cause of action arose in Devonshire and not in London, to which affidavit there was no answer. The Court discharged the rule, thinking that the affidavit being unanswered was sufficient, and that the order was right.

The Lord Chief Baron, in delivering the judgment of the Court, said:—

"The general rule on this subject may be thus stated, and we may say that we believe

it may be taken as the general opinion of all the judges. The application for this purpose may be made before or after issue joined, as may be most convenient to the parties in the proper conduct of the case. If the application be made before issue joined, it is requisite that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shown. It will be sufficient, however, for him to rely only on the fact that the whole cause of action arose in the county to which he desires to change the venue; but if he does so, he may be answered by any affidavits negativing this fact, or showing that the cause may be more conveniently tried in the county where the venue is laid. If made after issue joined, the affidavits in support of the application must show that the issues joined may be more conveniently tried in the county to which the party applying proposes to change the venue. Of course these affidavits are open to answer by the other party. In all these cases the Court or judge will decide, after hearing both sides, whether the venue is to remain, or will be changed as prayed, or be laid in some third county, according to its discretion."

His Lordship then read a rule which had been drawn up by certain of the judges to whom the matter was referred by the rest, which, although not promulgated as a rule of the Courts, was, as his Lordship said, one on which all the judges were disposed to act. The language of this rule was as follows, it being understood to apply only to the class of actions, in which, according to the old practice, the venue could be changed in the manner already explained:—

"The committee of judges to whom the question was referred as to the practice to be adopted, in consequence of Rule No. 18 in the Rules of Practice of Hilary Term, 1853, have to report:—

"First, that in their opinion it is more convenient, as a general rule, that the application to change the venue by rule or summons may be made before issue joined, provided that this shall not prejudice either party from applying after issue is joined to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county.

"Secondly, that a defendant, on his affidavit to obtain the rule *nisi* to change the venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but that he may, if he pleases, rely only on the fact that the cause of action arose only in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shows that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed. To these resolutions the signatures of Baron Parke and Mr. Justice Wightman were attached."

The practice as explained by the Chief Baron in the above case was endorsed by the Court of Common Pleas in *Begg* v. *Forbes and others* (23 Law J. Rep. (N.S.) C. P. 222), and the Court of Exchequer in *Smith* v. *O'Brien* and *Julland* v. *Riches* (26 Law J. Rep. (N.S.) Exch. 30, 31, repeated and confirmed what it had said in *De Rothschild* v. *Shilston*. The last cases cited were decided in 1856, about which time there seems to have arisen a mutiny on the bench, for we find two years later in a case of *Helliwell* v. *Hobson and another* (3 C. B. (N.S.) 761), Mr. Justice Crowder laying down the rule that the plaintiff has the right to lay his venue where he chooses, and ought not to be deprived of that right unless there is a manifest preponderance of convenience in a trial at the place preferred by the defendant.

In January, 1860, in *Durie* v. *Hopwood*, 7 C. B. (N.S.) 835, Chief Justice Erle said:—"It is important that a cause should be tried where the cause of action arose; and I think it is advisable to act upon that principle so far as the interests of justice can be made to coincide with that course." In the same year, 1860, in *Jackson* v. *Kidd*, 29 Law J. Rep. (N.S.) C. P. 221, Mr. Justice Willes boldly says:—"Some judges do not consider themselves bound by the resolutions read in *De Rothschild* v. *Shilston*."

So much for the history of changing the venue since the year 1853, which terminates with the case just reported of *Church* v. *Barnett and another*, with regard to which, it is, for the present purpose, unnecessary to do more than quote a portion of the judgment of Mr. Justice Willes, who thus gives the deathblow to the alleged resolution of the judges as stated in *De Rothschild* v. *Shilston*, and who also defines what is unquestionably the existing rule of practice. His Lordship said:—

"With respect to the so-called resolution of the judges in *De Rothschild* v. *Shilston*, certainly it is not a rule in so far as it suggests that it is sufficient for the defendant, on an application to change the venue, to state in his affidavit as a ground for the change that the cause of action arose in some other county than that in which the venue is laid. After that case of *De Rothschild* v. *Shilston*, defendants in practically undefended actions attempted, but unsuccessfully, for the mere purpose of delay, to obtain an order to change the venue from London, where it had been laid, to some place in the country, on an affidavit that the cause of action arose there. That part of the so-called resolution was never adopted, and was not properly a resolution of the judges at all. If it had been adopted, it would have been made a *rule of Court*. There is, however, no such rule, and the plaintiff has a right generally to lay his

venue where he thinks proper; and when he has not exercised a capricious choice, it is to be considered that he has exercised a right, and it lays on the defendant to show that the preponderance of convenience is in favour of trying the case where the cause of action arose, rather than at the place where the plaintiff has laid the venue.*—*Law Journal.*

THE LEGAL IMMUNITY OF LIBELLERS AND IMPOSTORS.

The recent scandal which has ended so disastrously for one of the most eminent and respected members of the Bar, draws attention to the present position of the law of libel, which it seems to us is not so satisfactory as it might be. In the first place the old saying, "the greater the truth the greater the libel," would appear to have been based upon a most just estimate of human character. A great truth may prove to be maliciously defamatory in the very highest sense of the term; the truth may be one which concerns only the persons implicated; it may be spoken or published to gratify private animosity of the most detestable kind. How then does the law say that it shall be dealt with? Putting aside the civil action to which a plea of the truth of the libel is a complete defence, the 6 & 7 Vict., c. 96, s. 6 enacts that, on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such a plea as thereinafter mentioned—that is to say, a plea of justification on the ground of the truth of the libel, and that it was for the public interest that it should be published—the truth of the matters charged may be inquired into, but the plea shall not amount to a defence, unless it was for the public benefit that the matter should be published.

Now upon this statute this condition of things appears. A person actuated by the worst motives may publish the most gross and scandalous libels, and may add to his iniquity by pleading in justification that they are true. And these libels are to be inquired into; the torture of public inquiry, which means the investigation of private character before the domestic forum of every household in the kingdom by means of the public press, is to be endured, with what results, whether to the innocent or the guilty, we have lately seen. It would be difficult for the most upright amongst us to stand a searching public examination into our lives, such an examination being conducted by a malignant and utterly unscrupulous enemy. Therefore it strikes us as a mistake in the enactment referred to to say that the matter shall be inquired into, and that subsequently, when all the torture of a preliminary inquiry has been endured, and private character made the sport of a coward, then the law shall say whether the truth, if proved, shall amount to a defence, by applying the test whether the publication was for the public benefit. Why not provide that at the very outset a libeller shall prove to the satisfaction of a magistrate that it is for the public benefit that the libel was published? If there had been such an enactment on the statute book could Chaffers have enjoyed for so many days his detestable notoriety? On the contrary he would now have been undergoing the punishment which he so richly deserves.

But we pursue the same lenient course towards all persons who can establish even a presumption of legal right. Our Continental critics laugh at us for permittting the Tichborne claimant to make the possessions of an ancient family and a lady's fair fame the sport of an audacious and villainous ambition. Why, they ask, did not the Attorney-General, as the only public prosecutor we have, at once fix upon some point and break the neck of an impoeture, and consign the claimant to the police? We can reply that had such a course been attempted, the Attorney-General would have been hounded down by the lovers of "fair play," for at the present time there are advocates in the Press who wish that the case "had been tried out." And had such a course been possible, the difficulties in the way would have been very considerable—difculties which would not be encountered in adopting our suggestion as to libel. We reach the height of absurdity when we not only do not compel a libeller to justify at the outset, but furnish him with a statutory form for defaming private character.

We have seen it suggested that we should establish courts of preliminary inquiry, but although we approve of the suggestion we very much doubt whether our reverence for the liberty of the subject would allow us to carry it into effect. We now simply deter sham and vexatious actions by compelling security for costs or remitting to County Courts, but this does not prevent trials coming to the surface which ought to have been suppressed at the earliest stage of their career. We admit, however, the difficulties which would attend the attempt to control cases of the Tichborne type, but as regards libels we think the course is plain and simple. We ought at once to adopt measures to stop the foul mouth of the traducer before he makes a public court the vehicle of his calumnies, and if some such steps as we have indicated are not taken, there is no member of society who, is not subject to the caprice of any villain who can, or who thinks he can, hit a blot in his or her character, and who can bring upon his victim life-long ruin and misery. Cases such as those of Sir Travers Twiss ought not to pass with out leaving a lesson in legislation as well as in morality.—*Law Times.*

* The practice as laid down by Mr. Dalton in Chambers, in this country gives prominence to the question as to where the cause of action arose, as will be seen by a note of his decision in *Harper* v. *Smith*, *ante* p. 67.—Eds. L. J.

CANADA REPORTS.

ONTARIO.

CHANCERY.—MASTER'S OFFICE.

Re Baker—Bray's Claim.

Insolvent Act—Double Proof.

1. The doctrine against double proof applies only when both estates are being administered in insolvency.
2. A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately endorsed the note.

[Master's Office, Dec. 8, 1871.—Mr. Boyd.]

Bray, the claimant, held notes made by Dawbarn & Co., and endorsed by Baker, a member of that firm. Baker died and his estate was being administered in Chancery by his widow, his executrix. Dawbarn & Co. went into insolvency, and Bray proved his claim upon the notes in the proceedings in insolvency. He then came in as a creditor to firm in the administration suit, and it was objected that he had elected to proceed against the joint estate of the parties.

S. G. Wood for Bray.

Snelling and *Keefer, contra.*

Mr. Boyd, Master in Ordinary.—Both parties cited and relied upon the decision of the Court of Queen's Bench in *Re Chaffey*, 30 U. C. Q. B. 64; but it was not very much help to a solution of the question discussed on this claim. That decision was upon the effect of certain clauses of the Insolvent Act of 1864. The facts were, that a partnership firm made a promissory note, which was endorsed by one of the partners to a creditor. The firm and the partner both became insolvent, and their joint and several estates were being administered in the Insolvent Court. It was held that the endorsement of the partner was a security for the payment of the creditor's claim, but not a security from the insolvent firm or from the estate of that firm within the meaning of sec. 5, subsec. 5, of that Act; consequently that that Act did not require the creditor proving on the partnership estate to put a value on this endorsement. In truth the case was not within the Act at all, but was governed by the general law as to securities held by a creditor, viz., that he can prove against the bankrupt estate retaining his security. Then the decision goes one step further—that if the partner's estate is in insolvency, the creditor retaining his security cannot rank upon the partner's separate estate as well as upon the joint estate of the partnership.

The case before me was argued as if the question arose entirely under the Insolvent Act of 1869. Assuming this for the moment, then section 60 of that Act supplies words sufficient to include the endorsement of an insolvent partner, *i.e.*, one who has been made an insolvent under the Act, not merely a person unable to pay his debts in full—one of an insolvent firm, under the foregoing state of facts, within the securities which are to be valued and dealt with by the Insolvent Court. In this view the question should have been raised before the Insolvent Court when Bray proved his claim there. But here the partner who endorsed is dead, and his estate is being administered, not in insolvency, but by the Court of Chancery, and the special provisions of the insolvent Act do not apply to the case. The rights of the creditors proving claims in this office are to be measured by the extent of their rights if they had been suing at law the executrix of the partner on his endorsement, after proving upon the partnership estate in insolvency, such proceedings in insolvency being instituted after the partner's death. Now, supposing Bray had been suing the executrix on her husband's endorsement, I know of no defence at law which she could set up: see per Mansfield, C. J., in *Heath* v. *Hall*, 8 Taunt. 328.

The rule laid down by Lord Lyndhurst, in *In re Plumner*, 1 Phil. 59, applies here: "If the creditor of a bankrupt *holds a security on part of the bankrupt's estate*, he is not entitled to prove his debt under the commission, without giving up or realizing his security. But if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound." Now, here the insolvent firm of Dawbarn & Co. are the makers, and Baker the deceased partner of that firm is the endorser; the claim of Bray is against the executrix of the endorser, clearly a third party as regards the partnership estate in insolvency. This is the opinion of the court in *Re Chaffey*, p. 70, though not necessary in that case for the decision of the appeal. See also *In re Sharpe*, 20 C.P. 82; and *Beas'y* v. *Beasly*, 1 Atk. 97. My conclusion is, that the creditor is entitled to prove for his full claim, and that my duty is to report the circumstances specially to the court, that they on further directions may impose any conditions that they think advisable upon this creditor, in view of his proving on the Dawbarn estate in insolvency. As to the mere right to prove without being obliged to elect, I may remark that even in Bankruptcy it is held that a joint and separate creditor ought to prove against both estates, but elect which he will be paid out of before he takes a dividend: *Ex parte Beatty*, 2 Cox, 218.

The case of *Ex parte Thornton*, 3 De G. & J. 454, a note of which Mr. Snelling very properly handed me, though it makes against his contention, is quite in point, and confirms the view I have taken, as it establishes the principle that the doctrine against double proof applies only when both estates are being administered in Bankruptcy. I also refer to *Ex parte Baurman*, Mont. & Ch. 573; s.c. 3 Deac. 476; *Ex parte Stanborough*. 5 Madd. 89.

CHANCERY CHAMBERS.

Shaw v. Freedy.

Suits for trifling amounts—Jurisdiction of the Court of Chancery.

The Court of Chancery will not entertain a suit where the subject matter of litigation is a sum not exceeding £10.

Where, therefore, after default was made in payment under a decree in foreclosure, in a suit in which the bill was filed to enforce a mortgage securing $18.53, a final order was refused.

[Chan. Cham., 25th May, 1872.—Mr. Taylor.]

Powell moved for a final order of foreclosure.

Mr. Taylor. On looking at the decree issued by a Deputy Registrar under Gen. Order 88, I see that the suit is one to enforce a mortgage securing payment of the paltry sum of $18.53. A decree should never have been made in such a suit *Gilbert* v. *Braithwaite*, 8 Chy. Cham. 413, is a decision of the full Court, that Lord Bacon's order of 9th January, 1618, is in force here. This had been previously held by the learned Chancellor in *Westbrooke* v. *Browett*, 17 Grant, 339. The expression used in that order is "shall not take jurisdiction in suits under the value of £10." As a decree has been made, and there is no application on the part of the defendant to dismiss the bill, I make no order to that effect, but I decline to interfere actively in favour of the plaintiff, and therefore make no final order of foreclosure as asked.

I may also observe that in this case there would, apart from the one I have already mentioned, be another reason for refusing the order. The amount the defendant is ordered to pay is incorrect, it being stated at a sum larger than the aggregate of the three sums principal, interest, and costs, when correctly added together amount to.

Order refused.

NOVA SCOTIA.

SUPREME COURT.

[Before the Chief Justice, Sir William Young, Kt.; Dodd, DesBarres, Wilkins, Ritchie, and McCully, JJ.]

Dodge v. The Windsor and Annapolis Railway Company.

The measure of damages where goods are injured in transitu —Payment into Court—Reduction of damages—New trial.

Where defendant, as a common carrier, tenders plaintiff at the place of destination, goods received to be forwarded, but injured so as no longer to be suitable for the purpose designed by the owner, the measure of damages to be recovered is their deterioration in value at the place of destination, in consequence of defendant's negligence, misconduct or neglect.

Plaintiff has no right to refuse to accept a deteriorated article, and claim the full amount of its value uninjured as damages.

[Halifax, Michaelmas Term, 1871.]

This cause came on for argument before the full Court in Banco, upon a rule *nisi*, granted by Mr. Justice Ritchie, who tried the same on the Western Circuit.

McCully, J., now (15th January, 1872.) delivered the judgment of the Court as follows:—

This was an action brought by plaintiff against defendant, tried before His Lordship, Mr. Justice Ritchie, at Kentville, in the Spring Circuit of 1871, and a verdict found for plaintiff. A rule *nisi* to set aside the verdict was obtained by the defendants, and was argued during this present Term. The grounds taken and relied on were that the verdict was against law and evidence, and for misdirection.

The action was brought against the defendants as common carriers, and sets out in the usual way in the first count a contract to carry for hire from Halifax to Middleton, in Annapolis County, goods to be delivered by plaintiff to defendants. Delivery is averred, and that all conditions performed, &c., and the breach assigned is non-delivery, whereby plaintiff was deprived of his goods for a long time, and the same were diminished in value.

The second count charges defendants as carriers for hire, and with having received of plaintiff a piece of oil cloth for the floor of plaintiff of the value of $30, to be carried from Richmond Station, Halifax, to Middleton aforesaid, and there delivered in good order and condition, &c, but that defendants did not use due care and skill in the carriage of said goods, but broke and damaged the oilcloth, whereby the same was wholly lost to plaintiff.

To this count, defendants pleaded ten pleas in all. First, that they did not promise as alleged. Second, goods not delivered to defendants for purposes, &c., as alleged. Third, goods were re-delivered to plaintiff within a reasonable time, &c. Fourth, goods improperly and negligently packed, which caused the damage and loss, &c. Fifth, goods damaged before they came to defendant's possession. Sixth, goods re delivered in same condition as received of plaintiff. Seventh, denial that defendants were common carriers. Eighth, did not receive the goods for the purposes, &c., alleged. Ninth, defendants always ready to deliver plaintiff his goods in the same condition as received, and he refused to accept. Tenth, payment of money ($3) into Court under the usual plea. Plaintiff replied, money paid in not enough.

The facts of the case were substantially as follows:—Plaintiff was residing at Bridgetown, and had ordered a piece of oilcloth, 16½ feet square, from Halifax, to cover his dining-room. On its arrival by the defendant's railway, it was found to be broken or cracked, and more or less damaged. Its value was sworn to be nearly $30. Plaintiff, on seeing it and the condition it was in, asked the conductor, being defendant's officer in charge, "If the oilcloth was in as good condition as when received by the Company?" His answer was "No. It had been placed on some barrels of flour in place of putting it on the floor of the car. The barrels were standing on their ends, and they took the barrels from under the ends of the oilcloth, and the package dropped at one end. It was done at Wilmot, and that caused the damage." Plaintiff, thereupon, refused to accept possession. This statement of facts by plaintiff stands uncontradicted. Beales, one of his witnesses, estimated the damage at $10. The point was broken and peeled up. Morgan, another witness of plaintiff, says it was cracked through nearly at the middle. The acceptance being refused by plaintiff, the oilcloth was sent to Kentville to defendant's warehouse. This was plaintiff's case.

The defence was in no material point contradictory of, or inconsistent with plaintiff's case except as to the extent and amount of damage the oilcloth had sustained.

Vernon Smith, the Manager of the Road, estimated that a quarter of a dollar would repair the damage. Louis Dodge valued the damage at $2 50. S. Pratt had it unrolled, and got Robertson a first-class painter, to inspect it. Witness valued the damage at 50c, but con-

sidered that would be a high price to pay for repairing it. Witness was authorized to make plaintiff an offer, and offered him $2 as a compensation (it is to be assumed for the damages.) Walker, another of defendant's witnesses, says it could be repaired for 25c, and be equally serviceable. John Dodge, a house joiner, "the damage could be repaired for 50c." Bouth Reid, a cabinet-maker, examined the cloth, and gives a minute description and a diagram, and adds it could be repaired for 50c, so far as durability; it might not look as well. The plaintiff and other witnesses were re-called, but their testimony was not in contradiction to that of defendants' witnesses, and does not affect the issue materially.

His Lordship, on the plea of payment of money into Court, explained to the jury that if they thought the damage sustained by plaintiff did not exceed the sum of $3, they should find for defendant, otherwise for plaintiff. His further direction was that if the article in this case was not seriously damaged, and was repairable, the owner was bound to receive it, and could claim what would compensate him for the damage, but if it was so seriously injured *that it could not be thoroughly repaired, he might refuse to receive it, and claim its value.* That in this case, they would be at liberty to give the whole value of the oilcloth, deducting the amount paid into Court, if they should think that, taking into account the value of the injury and what has been said about its repair, the plaintiff could not reasonably have been required to accept it, having in view the object for which he had purchased it, and the use to which he intended to apply it. The jury found a verdict for $23 50, the full value after deducting the $3 paid into Court.

The main question for the Court to consider in this case is whether the jury were properly directed on the point of law, arising out of the foregoing state of facts. In this Province there being no statutes qualifying the Common Law in reference to the responsibilities and rights of common carriers or railway companies, the naked question presents itself, in case of non-fulfilment by this class of bailees for hire to complete their contract, as to the delivery of goods in the condition in which they received them—what is the law in reference to damage of goods by a common carrier, and in whom is the property of a damaged chattel, as in this case more or less injured, while *in transitu?* In other words is the owner of the goods, being himself the consignee, as in this case, justified in refusing to accept them in their damaged condition, and in claiming from the carrier the entire cost of the article by reason of his failing to perform his contract to deliver in good order; or is the proper measure of damage the mere deterioration in value of the article by reason of the injury, giving no election to the consignee to refuse accepting the property and right of property continuing in himself?

On the part of defendant it was contended that there had been a misdirection. Add. on Torts, 490, and other authorities were cited upon this point, but the cases they contemplate are an entire loss or destruction of the article—loss from non-delivery in time and the like. But if this action is to be sustained and the full value of the goods recovered, because of a partial injury, and that reasoning based upon the fact as it was put, that defendant has failed to fulfil his contract, the same reason should certainly apply when by carelessness or negligence or other unjustifiable cause, the carrier fails in his delivery as to time, and the plaintiff is injured by a decline of price in the market. Goods delayed may thus become comparatively valueless to the owner or consignee. But while cases as to the point in dispute here are difficult to find, and this may be, and probably is, because the plaintiff is attempting to establish a new principle; in other cases where carriers are in fault, as to delay in delivery, the amount of damage, and the principle as to measure and computation well settled and clear.

In *Simmons* v. *S. E. R. W. Co.*, 7 Jurist N. S. 849 Ex., Bramwell, B., said if goods are delivered too late by a carrier, the owner ought instantly to sell at market price and realize his loss, and the difference between the price he obtains by the sale at that time, and that which he would have obtained, is the only measure of damage, and see *Wilson* v. *Lancashire & York R. W. Co.*, 9 C. B. N. S. 632. What pretence or reason can be urged why if a carrier commits a breach of contract by neglecting to deliver goods in time (intended perhaps for exportation), which in consequence of a ship having sailed, or for other cause the consignee no longer requires, that in that case the damage must be ascertained by sale, and yet if the breach occur by carelessness so that the goods are deteriorated by a slight injury, there must of necessity be another measure of damage.

The numerous cases cited as between vendor and vendee, and the right to reject or retain property, have no application here, and I have searched in vain to find a single case to show that negligence, carelessness or misconduct of any kind on the part of a common carrier, does more than entitle the contractor to recover damages for the non-fulfilment of his contract to the extent of the depreciation produced by the carrier's default. There is a large collection of cases in Fisher's Digest, under the sub-section "Damages," p. 1,498, with nice and technical distinctions, touching delivery, falling markets, prospective profits, but nowhere do I find that the consignee or owner has an election that enables him to divest himself of the property or the right of property in goods carried, whether injured or belated, and claim the full value from the carrier. To show how uncertain and capricious the rule would be, if it rested with a jury to find when the consignee might or might not decide to abandon his goods, no better case could be cited by way of illustration than the present. Beales, plaintiff's own witness, spoke of damage as high as $10 or a little over one-third of the value of the article, but if plaintiff had called an auction and sold the cloth, as he might have done, or had the damages appraised by competent judges, judging from what the other witnesses testify, it is by no means certain that the value of the cloth was so much depreciated, even as Beales represented.

If the principle contended for by plaintiff had ever had the sanction of an English Court of

Law, viz., the right in special assumpsit to recover as here the entire value, surely some cases to that effect could be found in the books. My research has not rewarded me with any case or any principle that underlies or would countenance such a position, as is sought to be established. The absence of such, I remark, is only to be accounted for, I think, by assuming that the common law carrier, pretty well weighted with liabilities already, is not compellable at the election of the owner to take all goods damaged much or little, and account to him for their full value. I am, therefore, of opinion that his Lordship's direction upon this point cannot be upheld. It was then contended on the part of plaintiff's counsel that the payment of money into Court on the declaration *generally* was an admission, not only of the contract as laid, of all conditions fulfilled, and of the breach, but of the total loss as set out in the second count. This position was urged with a good deal of confidence, but the court on the argument expressed a pretty strong dissent from any such position.

The doctrine of payment of money into Court, and its effect upon the pleadings and the case is to be found very ably and clearly discussed in Taylor on Evidence, sec. 760 to 765, both inclusive, and it will there be seen that no such consequence follows from payment of money into Court, as that contended for by plaintiff's counsel. At sec. 766, it is said that although payment into Court admits the entire contract declared on, as also the specific breach in respect of which the payment is made, it does not admit any damages on that breach beyond the sum paid in, still less does it admit any other breach to which the payment does not apply. And the writer illustrates it thus, "payment of money into Court upon a count in a valued policy of insurance, which states a total loss by capture, admits the contract and the capture, but not the total loss; and the plaintiff therefore must still prove that he has suffered damage from the capture beyond the sum paid." The law upon this part of the case was properly put to the jury, and before the plaintiff was entitled to recover damages, ultra $3 paid in, it was incumbent on him to prove that he had sustained them.

Having carefully considered such of the cases cited on the argument as have a bearing upon the merits of this controversy, in my view of the matter, it falls within that category of which *Leeson* v. *Smith*, 4 N. & Man. 304, is an exponent. In that case it was decided where upon showing cause against a non-suit or a new trial, it appears that the verdict has been entered for an amount not warranted by the evidence the Court will make the rule absolute, unless the parties consent that the damages shall be reduced, in which case neither party pays to the other costs of the rule. See *Hussey* v. *Met. R. W. Co.*, 20 L. T. N. S. 612.*

[* There is a singular absence of cases upon the principal point decided in *Dodge* v. *The Windsor and Annapolis Railway Company*. We find none touching upon it in our own or the English Courts. In *Redfield on Railways*, vol. ii. p. 185, it is laid down in conformity with the judgment of McCully, J., that "when the goods are only damaged, the owner is still bound to receive them, and cannot abandon and go against the carrier as for total loss." The same view of the law seems to be taken in *Angell on Carriers*, 4th Ed., § 482, note A. It would appear that if the goods are so much damaged as to amount to destruction of them, or if the nature of the property is so altered through negligence that it would amount to a conversion, then the owner is entitled to bring his action for the full value, otherwise his damages will be limited to the diminution in value resulting from the carrier's carelessness. *Scoville* v. *Griffith*, 2 Kern. 509.—Eds. L. J.]

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

Frost v. Knight.

Breach of promise of marriage—Repudiation of the contract before the time agreed upon for performance.

The defendant promised the plaintiff that he would marry her on the death of the defendant's father. Before the death of his father, the defendant announced his absolute determination never to fulfil the promise.

Held (reversing the decision of the Court of Exchequer), on the authority of Hochester v. De La Tour (2 E. & B. 678; 22 L. J. 455, Q. B.), that the plaintiff might at once regard the contract as broken in all its obligations and consequences, and sue for the breach thereon.

[Feb. 7, 1872.—26 L. T. N. S. 77.]

This was an appeal from the judgment of the Court of Exchequer, and was an action for a breach of promise of marriage, tried before Martin, B., at the Staffordshire Spring Assizes, 1870. Evidence was given to show that the defendant promised to marry the plaintiff on the death of his father, and also that he refused to perform the promise; while it was proved that defendant's father was still alive.

A verdict having been obtained for the plaintiff with £200 damages, *Powell*, Q. C., obtained a rule, which was afterwards made absolute, for a new trial, on the ground that the learned judge ought to have nonsuited the plaintiff, Martin, B., dissenting (39 L. J. 227, Ex.; 23 L. T. Rep. N. S. 714). The plaintiff having appealed, the case was reargued last Trinity Term in the Exchequer Chamber before Cockburn, C.J., Byles, Keating, Lush, and Smith, JJ.

June 20.—*A. J. Staveley Hill*, Q.C., and *C. Dodd*, for the plaintiff, said: The simple question is whether plaintiff upon a contract by the defendant to marry her as soon as his father died, can sue the defendant in an action for the breach of that contract before the father's death. The rule in such cases is thus laid down in Leake on the Laws of Contracts, p. 462, "If, before the time appointed for performing the contract has arrived, the promiser wholly refuses to perform it, the promisee may be entitled to treat such refusal as an immediate breach of the contract, and to commence an action for damages in respect of it;" and the cases of *Hochester* v. *De La Tour*, 2 E. & B. 678; 22 L. J. 455, Q.B., and *The Danube and Black Sea Railway, &c., Company* v. *Xenos*, in error from the Court of Common Pleas, 5 L. T. Rep. N. S. 527; 13 C. B., N. S., 825; 31 L. J. 284, C. P.; are there cited as authorities for that proposition. So also, in the notes to *Cutter* v. *Powell*, 2 Smith's L. C., 6th edit., p. 39, the learned annotators, referring to the judgment of Parke, B., in the case of *Philpotts* v. *Evans*, 5 M. & W. 475, which is relied on by the defendant in the present case, say, "It is impossible, however, even on this ground," viz., by supposing that the judgment in *Hochester* v. *De La Tour* applied to cases in which, in consequence of the refusal,

His right acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly. The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of future nonperformance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual nonperformance may therefore by anticipation be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must tend to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in such cases avert, or at all events materially mitigate, the injurious effects that would otherwise flow from the nonfulfilment of the contract; and, in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or should have been diminished. It appears to us that the foregoing considerations apply to a contract, the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time, and we are therefore of opinion that the principle of the decision in *Hochester* v. *De la Tour* is equally applicable to such a case as the present. It is next to be observed that the law, as settled by *Hochester* v. *De la Tour* and the *Danube and Black Sea Company* v. *Xenos*, is obviously quite as applicable to a contract in which personal status or personal rights are involved as to one relating to commerce or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in future. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to social status accruing on marriage, but a new status, that of betrothment, arises between the parties. This relation, it is true, has not by the law of England the same important consequences which attached to it by the canon law and the law of many other countries, nevertheless it carries with it consequences of the greatest importance to the parties; each becomes bound to the other; and neither can consistently with such a relation enter into a similar engagement with another person. Each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman more especially it is all important that the relation shall not be put an end to. Independently of the mental pain occasioned to the feelings by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions, nor could she admit of such approaches if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see therefore every reason for applying the principle of *Hochester* v. *De la Tour* to such a case, and for holding that the contract is broken on repudiation not only in its present but in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that as the desire for marriage and the happiness to be expected from it diminish with advancing years, where by the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that consequently an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We cannot but think that in estimating the amount of injury, and the compensation to be made for it, the wasted years, if the contract were broken when the time for marrying had come and the impossibility of forming any other engagement during the intermediate time, should be taken into account and not merely the age of the parties and the then existing value of the marriage. It appears, therefore, manifest that it is better for both parties—for the party intending to break the contract as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and give a right to the party wronged to bring an action at once and have the damages assessed at the earliest moment. No one can doubt that morally speaking a party who has determined to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise is come. The reason is, that giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates the injury to the other party. It has been urged that there must be great difficulty in thus assessing damages prospectively; but this must always be more or less the case whenever the principle of *Hochester* v. *De la Tour* comes to be applied. It would equally exist where one of the parties by marrying another person gave rise to an immediate right of action. It cannot be said that the difficulty is by any means insu-

perable, and the advantages resulting from the application of the principle of *Hochester* v. *De la Tour* are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages. We are struck by the fact that the majority of the Court of Exchequer, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But the rights and obligations of the parties arising here entirely out of contract, we are at a loss to see how such an action could be maintained. But be that as it may; as in such an action the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simplest course—the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochester* v. *De la Tour*—to hold that the present action for breach of contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the nonfulfilment of the promise, as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred. We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

Byles, J.—I think that the plaintiff below is entitled to recover both on principle and on authority; but as my judgment was prepared before I had the advantage of seeing that of the Lord Chief Justice, and as this is a case of great importance, I think I ought to deliver it. An express precontract of marriage, as already suggested by the Lord Chief Justice, places the man and woman in the condition or status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach, marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed or dependent on a future event. So I conceive the man cannot, during the stipulated period of betrothment, without a breach of contract marry another woman, though that woman may die in the mean time. So for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me equally a breach of the contract, for it puts an end to the condition of betrothment, which according to the contract was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract But independently of the peculiarities attending a precontract of marriage, the decision in *Hochester* v. *De la Tour* shows that in the analogous case of a precontract for future service the refusal of one of the parties to perform the contract, though before the time appointed for its fulfilment, is a breach. The decision in that case goes further than is necessary for our decision in this case, for there no status had been established like that involved in a precontract of marriage. Indeed, the Court of Common Pleas, in the case of *Wilkinson* v. *Verity*, and the court of error in *Xenos* v. *Danube Company*, 13 C. B. 825, have laid it down that absolute unconditional renunciation of a contract before the time of performance amounts to a breach at the election of the promisee.

Judgment of the Court of Exchequer reversed.

QUEEN'S BENCH.

Newby v. Von Oppen and others.

Foreign corporation—Service of writ—Common Law Procedure Act 1852, ss. 16 and 17.

The joint defendants were an American corporation, not incorporated, but having a branch place of business and their agent in this country. The latter managed all the business of the corporation in this country, but was authorized only to sell goods, and forward executory contracts to his principals for approval. The action was brought upon an alleged breach of a contract entered into in this country between the plaintiff and the agent. Two copies of the writ were served at the place of business, one directed to the agent, and the other to the corporation.

Held, upon application to strike the name of the corporation out of the writ and subsequent proceedings, that the service was good.

[Jan. 18, 31, 1872.—26 L. T. N. S. 164.]

This was an appeal from chambers. Master Unthank had, on the 28th June, 1871, made an order that the writ of summons and all subsequent proceedings thereon be amended by striking out the name of the Colt's Patent Firearms Manufacturing Company, who were co-defendants with the said Von Oppen. M. Smith, J., upon appeal, made no order, and referred the matter to the court.

E. Clarke had obtained a rule *nisi*, calling upon the company to shew cause why the order of the Master should not be rescinded. He relied upon some dicta of Lord St. Leonards in *The Carron Iron Company Proprietors* v. *Maclaren*, 5 H. of L. Cas. 416.

It appeared from the affidavit of the defendant Von Oppen that this action was brought against him and Colt's Patent Firearms Manufacturing Company as joint defendants to recover the sum of £180 claimed to be due from them jointly to the plaintiff for commission on sale of revolvers and rifles, as appeared by the writ of summons and the indorsements thereon.

Two copies of the said writ of summons, dated 21st June, 1871, by which this action was commenced, were served on the deponent personally on Wednesday, the 21st June instant. The person who so served the same stated that one copy of the said writ so served was intended for him and the other copy of the said writ so served on him was intended for the said company.

The co-defendants, the Colt's Patent Firearms Manufacturing Company, are a foreign corporation, incorporated in, and according to the laws of the United States of America, and of the State of Connecticut in and one of the said United States, and liable to be sued in the said United States upon all contracts made by them, whether so made in the said United States of America or elsewhere out of the said United States, and the said corporation's only manufactory and their principal place of business are at Hartford, in the county of Hartford, in the said State of Connecticut in the said United States of America; where the meetings of the directors and shareholders in the said corporation alone are and can lawfully be held.

The said company is not, nor has ever been registered as a joint stock company under or

according to any statute passed by the Legislature of the United Kingdom of Great Britain and Ireland, nor is it, nor has it ever been, incorporated in the said kingdom, or any part thereof, either by Royal Charter, Act of Parliament, or otherwise, according to the law of the said United Kingdom, or any part thereof.

The defendant Von Oppen is the only agent of the said corporation in the said United Kingdom, and he carries on the business of the said corporation at an office in London, at No. 14 Pall Mall, in the city of Westminster, but is not a member of the said corporation, nor has he nor anyone in the said United Kingdom any power or authority to receive process from the said corporation, or to appear to or defend any action brought against the said corporation, either alone or jointly with any other person or persons, or otherwise.

His authority for acting as the agent of the said corporation is a power of attorney granted to him by the said corporation, bearing date the 29th January, 1867, whereby he was only empowered to sell all the arms then on hand at the place of business of the said corporation in London, and all that might from time to time thereafter be sent by the said corporation to him for sale. Also to make executory contracts for the sale and manufacture of arms, but such executory contracts were not to be binding on the said corporation until they should have been ratified and approved by the said corporation in writing; and also to receive and collect all moneys that might be due to the said corporation, or that might thereafter become due to the said corporation, in the course of the business of the said sale of arms.

On the 23rd June instant, the defendant, Von Oppen, received a telegram from the said company, which authorized him to take proceedings for the purpose of setting aside the said writ, and the copies and service thereof, and all subsequent proceedings taken by the said plaintiff in this cause; and he instructed Geo. E. Thomas, one of the attorneys of this honourable court, accordingly.

Manisty, Q. C. and *Philbrick*, for the co-defendants, the Colt's Patent Firearms Manufacturing Company, shewed cause. It has been held in the case of *Ingate* v. *Austrian Lloyd's*, 4 C. B. N. S. 704, that sec. 16 of the Common Law Procedure Act 1852, does not apply to a foreign corporation. The words of that section are: "Every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officers, or on the town clerk, clerk, treasurer or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any company of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred or other like district, on some peace officer thereof." By sec. 17, "The service of the writ of summons, wherever it may be practicable, shall, at heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge seem fit." In the case of *Evans* v. *The Dublin and Drogheda Railway Company*, 14 M. & W. 142, the private Act incorporating the defendants provided for the service of process upon a secretary or clerk, or by leaving the same at the office, or in case the same respectively should not be found or known, then by personal service upon any director of the company. The defendants had no office or agent in England, and it was held that the service of a writ upon one of the directors in London was null and void. At common law, clearly, service of a writ upon such an agent as this was of no avail, and by the Common Law Procedure Act, and these cases upon it, the company who are defendants here do not come within the provisions of the 16th section. In the case of *The Carron Iron Proprietors* v. *Maclaren*, cited upon the motion for the rule, the foreign corporation possessed real estate in this country, and yet the majority of the Lords held that an injunction against the corporation issued from the Court of Chancery, notice of which had been served upon the agent in London, and the manager in Scotland, could not be maintained. There is a query in the head note whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is merely an agent for the sale is the goods of the principal. Although the point does not seem to have been mentioned before the Master, there is nothing to show that the contract here sued upon arose in this country.

Clarke supported the rule.—*The Carron Iron Company Proprietors* v. *Maclaren* was not decided upon the ground that the Court of Chancery had no jurisdiction; and the opinion of Lord St. Leonards, although he dissented from the final conclusion of the majority, may be taken upon this point to be that of the whole House (p. 449): "The first question is, were the appellants within the jurisdiction so as to authorise the court to enjoin their proceedings? They are incorporated, and they are called a Scotch corporation; their manufactories are in Scotland, but they have houses of business in England, which they necessarily carry on by agents or managers; and they have real as well as considerable personal property in England. The testator was a shareholder at his death, to the extent of £80,000; and his representatives are entitled to his shares, and are in truth partners in the concern. I think that this company may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured. The business transacted in Eng-

land is very extensive. The places of business may, for the purposes of jurisdiction, properly be deemed the domicile. The corporation cannot have the benefit of its place of business here without yielding to the persons with whom it deals a corresponding advantage. The claim of the company is in respect of dealings here. Service on one member of a corporation is good service. Upon general reasoning, I think that the company may, for the purposes of the suit in Chancery, be treated as within our jurisdiction." Here, although not stated in the affidavit, the contract was made in London. [Cockburn, C.J. —That must be admitted at this stage of the case] By the interpretation clause, sec. 227 of the Common Law Procedure Act 1852, "wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applicable to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction:" this being so, and it being admitted in Von Oppen's affidavit that the writ has come to the knowledge of his co-defendants, the court may order under the 17th section that the plaintiff be at liberty to proceed against all the defendants The case of *Ingate* v. *Austrian Lloyd's* is not in point, being a decision upon the 18th and 19th sections only, as to service out of the jurisdiction. [*H. Lloyd*, Q.C., as *amicus curiæ*, mentioned an unreported case of *Roberts* v. *The Grand Trunk Railway of Canada*, in which the service of a writ upon the chairman of the defendant's consultation board in London, the defendants being incorporated only in Canada, was upheld by the court of Exchequer.] *Cur. adv. vult.*

Jan. 31.—Blackburn, J., delivered judgment. This was a rule obtained to show cause why an order of Master Unthank, setting aside the writ and service, so far as regarded the Colt's Patent Firearms Manufactory Company. The facts do not appear to have been very distinctly brought before the master at chambers, but we take them to be as follows. The Colt's Patent Firearms Manufactory Company is not an English corporation It is an American company incorporated by American law; but this foreign corporation has a place of business in England, and there *de facto* carries on business just as an English corporation might do, though their principal place of business and head office were in America. The contract, which plaintiffs allege to have been broken, was, as they allege, made in England by the foreign corporation thus carrying on business here. The writ was served on the manager of their business in England, who appears to be the head officer, and, indeed, the only officer of their English branch, but who certainly was not the head officer of the American corporation in the United States. Two points were raised and argued before us. It was said that a foreign corporation cannot be sued as defendants in an English court at all. If so there is no remedy at all in an English court to enforce a contract made with a foreign corporation, inasmuch as the individual, who constitute the foreign corporation cannot be made liable personally on its contracts or for its torts: See *General Steamboat Navigation Company* v. *Guillou*, 11 M. & W. 877 There can be no doubt since the cases of *The Dutch West India Company* v. *Van Moses*, 1 Strange 612, and *Henriquez* v. *The Dutch West India Company*, 2 Lord Raymond 1532, one of which was a proceeding against the bail of the defendant in the other case, and it was affirmed in the House of Lords, that a foreign corporation can sue as plaintiff. Lord Raymond in a note tells us that the original case was tried at *nisi prius* before Lord King, when Chief Justice of the Common Pleas at *nisi prius* in 1734, when it appeared that the cause of action accrued in Ireland, and adds, "And upon the trial Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there. And after hearing the objections made by the counsel for Jacob Senior Henriquez, Van Moses, he directed the jury to find for the plaintiffs, which they accordingly did, giving them £13,720 damages. And afterwards a motion was made in the Common Pleas to set aside the verdict, but by the unanimous opinion of that court the motion was denied." This points to a difficulty which arose both in the *General Steam Navigation Company* v. *Guillou* and in *Ingate* v. *Austrian Lloyd's*; for it must often be a nice and difficult question whether a continental company is really by the law of its own country a corporation or not. But no such difficulty arises where the company is one belonging to Scotland or one of our own colonies, or to those parts of the United States where the common law prevails. In the *Carron Iron Company Proprietors* v. *Maclaren*, the Master of the Rolls had granted an injunction against the defendants, a Scotch, and therefore a foreign corporation. The injunction was dissolved on the ground that the appellants were foreigners, and as such entitled to the advantage which the law of their own country gave them; but no objection was raised on the ground that the court of equity could not treat a foreign corporation as a defendant. It is true that we are not aware of any reported case in which a foreign corporation has been sued in a court of law, but it seems to follow from their being permitted to sue as plaintiffs, that they must be suable as defendants. It is, however, enough to say that we will not on this ground prevent the plaintiffs from proceeding. The corporation may, if so advised, raise the question after appearing on the record. The other and more difficult question is whether the corporation has been properly served, supposing them to be suable. It was argued that the American corporation was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction, subject to the difficulties which are pointed out in *Ingate* v. *Austrian Lloyd's*. This could be so if the foreign company had merely employed an agent here who made a contract for them. But we think it is different where the foreign corporation actually has a

place of business, and trades in this country. This is a point of considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see from this case that there is at least one American corporation that has set up a branch business here, and there will probably soon be more. Such a corporation does for many purposes reside both in England and in its own country. In the case of the *Carron Iron Company Proprietors* v. *Maclaren*, Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts; he says (p. 459): "If the service upon the agent is right, it is because in respect of their house of business in England they have a domicile in England. And in respect of their manufactory in Scotland, they have a domicile there There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction—one in Scotland and one in England; and, for the purpose of carrying on their business, one is just as much the domicile of the corporation as the other." The majority of the Lords took a different view of the facts, and thought that though the corporation possessed property in England, and had agents there, they did not carry on business there, but we do not find that they differed from Lord St. Leonards' view of the law, if they had agreed as to his facts; and in the present case the fact is clear that the American Company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there. One more point was to be noticed. At common law the service of a writ on a corporation aggregate, which, from the nature of the body, could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation, and then proceeding by distress: (See 1 Tidd's Practice p. 119, edit. of 1824) The 2 Will. 4, c. 39 s. 13, and the 15 and 16 Vic. c. 75, s. 18, in fact only re-enact the old law as to what should be service on a corporation. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation We think that when once it is established that the corporation is to be treated as resident in England, the proper officer is the officer at the English branch, and that it is not necessary to serve the process on the officer at the head office abroad. We have been furnished by the courtesy of Mr. Lloyd, as *amicus curiæ*, with the papers in a case of *Roberts* v. *The Grand Trunk Railway of Canada*. It appears that the defendants, being a Canadian corporation, had a board of directors who acted for them in England. The writ was served on the secretary of that board, and on an affidavit of service, judgment was signed. Crowder, J., at chambers, stayed all proceedings on the judgment, on the terms that the defendant should bring money into court The case was therefore in its circumstances very similar to the present. The present Chief Justice of the Common Pleas, on the affidavit of these facts, and an affidavit of merits, obtained in the Exchequer a rule *nisi* to set aside the judgment. The rule was made absolute—the defendants to appear in ten days; the money to remain in court to abide the order of the court or a judge. Costs of the application to be costs in the cause. If we could be sure that this was the judgment of the court pronounced *in invitos*, it would seem clear that the Court of Exchequer thought the judgment regular, and only to be set aside on terms, and it would therefore be an authority in favor of the view we take. But we rather think that the matter was settled by the agreement of counsel, without the court being called on to pronounce any opinion on the subject, and therefore we do not rely on this as a decision. The result is that the rule in the present case must be made absolute. *Rule absolute.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

(*From the American Law Review.*)

FOR NOVEMBER AND DECEMBER, 1871, AND JANUARY, 1872.

Acceptance.—See Bankruptcy, 2.

Action.—See Common; Pleading.

Admiralty.—See Piracy; Pleading; Salvage.

Adultery.—See Condition.

Adverse Possession.

A. and B. occupied a copyhold let to them by a tenant for life. At the death of said tenant for life, B. was entitled to an undivided third for life, and A. and C. were each entitled to one-third in possession, and a moiety of the other third in reversion expectant on B.'s death. A. and B. continued in possession of the whole copyhold, thereby holding one-third unlawfully, for more than twenty years after the death of said tenant for life, when B. died. *Held*, that after the death of the tenant for life, A. and B. held as joint tenants, and that therefore B. had no interest which he could devise. *Ward* v. *Ward*, 6 Ch. 789.

See Landlord and Tenant.

Agency.—See Principal and Agent.

Allotment.—See Company, 2, 3.

Ambiguity.—See Evidence.

Ancient Light.

To obtain an injunction restraining the building of a house, because of its diminishing ancient light and air, a substantial diminution must be shown. It appears that in such case a house is entitled not merely to a certain quantity of light sufficient for it, and no more, but to the quantity that has been anciently enjoyed. —*Kelk* v. *Pearson*, L. R. 6 Ch. 809.

Annuity—See Bequest, 1, 10; Devise, 4.

Apparel.—See Salvage, 2.

Appeal.—See Pleading.

Appointment.—See Power.

Arbitration.—See Broker, 1; Contract.

Assignee.—See Husband and Wife.

Assignment.—See Surety, 1.

Attorney.—See Mortgage, 4.

Average.—See Insurance, 1.

Award.—See Contract.

Baggage.—See Salvage, 2.

Bank.—See Company, 1.

Bankruptcy.

1. The Plaintiff gave the defendant a guarantee as follows: "I guarantee payment of goods which you may supply E., but so as my liability shall not exceed £250." E. became bankrupt; the defendant proved the whole amount due him, and then the plaintiff paid him, as agreed, £250. E.'s estate declared a dividend: *Held*, that the plaintiff was entitled to the dividend on the amount of £250.—*Hobson* v. *Bass*, L. R. 6 Ch. 792.

2. A. consigned goods to B. for sale, drawing on him against the goods, and indorsed the bills to a bank, giving it the bills of lading as security. B. accepted the bills, "payable on delivery of the bills of lading." B. became bankrupt before the notes became payable, and the bank offered to prove the whole value of the notes: *Held*, that, as B. accepted only the bills of lading being delivered to him, the bank's security was in fact on B.'s property, and that the bank could prove the notes only on deducting the security.—*Ex parte Brett*, L. R. 6 Ch. 838.

3. The rescission and abandonment by an insolvent firm, of a speculation in which it is interested jointly with another firm, while the result is still uncertain, is in no way a fraudulent preference of the second firm.—*Miller* v. *Barlow*, L. R. 3 P. C. 733.

See Surety; Proof.

Bequest.

1. A testator bequeathed to his executors and trustees his interest in premises in which he carried on his trade, and his stock in trade, &c., in trust to permit his son to carry on the business "upon the terms and conditions following," that his son should pay certain annuities to his wife and daughter. An action was brought against the son and daughter by the sole executor and trustee for administration, alleging that the son had not paid the annuities, and the son filed an answer stating that no application for the same had been made to him by the daughter, and that he intended to pay to the wife her annuity. The daughter then brought the present bill against the son, praying a declaration that she was entitled to her annuity, for an account, for a declaration that the defendant was a trustee of said premises, stock in trade and profits, for payment of the annuity, and for further relief. Defendant demurred, on the ground that he had offered to account for the property in the former suit, so that this bill was unnecessary; and that should the above bequest be in trust to pay annuities, then the executor had not assented to the bequest, and was a necessary party; and he answered farther that he claimed said premises, stock in trade, &c., to hold subject to the terms of the will. *Held*, that the defendant had incurred a personal liability for said annuity, and had confessed an equity, and that the executor was not a necessary party. Demurrer overruled.—*Rees* v. *Engelbach*, L. R. 12 Eq. 225.

2. Testator bequeathed stock to trustees in trust to pay the dividends to his wife during her life. "And as to the rest, residue, and remainder of my estate, between my four sons . . . share and share alike, with benefit of survivorship, unless they shall die leaving issue, then the property shall go to his or their issue." It was claimed that said sons had a life estate only, with remainder in their issue: *Held*, that "if they shall die leaving issue," meant if they shall die, leaving issue, before the period of distribution, which was, in this case, the death of the tenant for life; and that said sons took absolute estates if they survived said wife, though they had children.—*In re Hill's Trusts*, L. R. 12 Eq. 302.

3. Testator bequeathed leaseholds to trustees to pay the rent to three nieces for life; and after the decease of each, her third in trust for her children living at her decease; if either should die without children surviving her, her share in trust for all testator's nephews and nieces then living, and the children of those dead. Trustees to have power to sell for the purpose of division and distribution. The trustees renounced, and a nephew was appointed administrator with the will annexed. One of said three nieces died childless, and the court decreed that her share had passed to the nephews and nieces, and that the leaseholds be sold: *Held*, that the legal estate was in the administrator, and not in the beneficiaries.—*Wyman* v. *Carter*, L. R. 12 Eq. 309.

4. A testatrix bequeathed £1400 in trust to pay the income to M. for life, remainder in trust for her children, exclusive of her two eldest sons, surviving her and attaining twenty-one; and £1500 to said two eldest sons; the remainder of her property "to M., and such of

her children as should attain twenty-one, including her two eldest sons, in equal shares and proportions for their respective own absolute use and benefit:" *Held*, that M. took a life interest in the residue.—*In re Owen's Trusts*, L. R. 12 Eq. 316.

5. Bequest of money upon trust to divide the same "among such of my grandchildren as shall attain the age of twenty-one equally, such children to have a vested interest at twenty-one." *Held*, that only such children as were alive on the eldest attaining twenty-one were entitled to a share, and that afterborn children were excluded.—*Gimblett* v. *Purton*, L. R. 12 Eq. 427.

6. A testator gave all his property to his wife "for the use of herself and all my children, whether born of my former wife, or such as may be born of my present wife." *Held*, that the wife was tenant for life with remainder to the children as joint tenants.—*Newill* v. *Newill*, L. R. 12 Eq. 432.

7. A testator bequeathed his property as follows: "As for my worldly goods and chattels I bequeath them as followeth: to my daughter all moneys both in the house and out of it." *Held*, that the daughter did not take shares in a building society, nor consolidated bank annuities.—*Collins* v. *Collins*, L. R., 12 Eq. 455.

8. A testator left shares of his property "to each of his two daughters to be settled on themselves at their marriage." The daughters attained twenty-one, being unmarried. *Held*, that they were entitled to their shares absolutely.—*Magrath* v. *Morehead*, L. R. 12 Eq. 492.

9. A testator, by a codicil, bequeathed to certain persons sums respectively equal to, greater, and less than sums bequeathed to said persons by a former codicil. *Held*, that such bequests in the absence of evidence to the contrary, were cumulative.—*Wilson* v. *O'Leary*, L. R. 12 Eq. 525.

10. A testator directed trustees in case there should be surplus income after payment of certain annuities, to invest the same yearly, and after the death of the survivor of the annuitants, to convert the trust fund into money and stand possessed of the same in trust to pay and divide the same among five public charities named, according to the amounts set after their respective names. The testator had no next of kin. Provision had been made for payment of the annuities, and there was a large surplus of pure and impure personalty. *Held*, that said charities were entitled to the pure personalty in equal proportions, but that the same must accumulate until further order. Also, that the impure personalty be paid to the Crown.—*Harbin* v. *Masterman*, L. R. 12 Eq. 559.

11. A testator bequeathed his residuary estate to A. and B. In a codicil he directed that A., B., and C. should be inserted in place of A and B., so that C. "shall and may participate in such bequest, free from legacy duty, with the said A and B." *Held*, that the word "participate" showed that the testator intended to create a tenancy in common between A., B., and C.—*Robertson* v. *Fraser*, L. R. 6 Ch. 696.

12. A testator beqeathed his property in trust for his niece for life, and after her decease the trustees to pay the principal "unto and amongst all and every the children of my said niece, born or to be born, which shall be living at the time of her decease, if more than one, equally, share and share alike; and if only one, then wholly to such only child, and the same to be a vested interest in him or them respectively on their respectively attaining the age of twenty-one years, but not to be transferred until after the decease of my said niece. *Held*, that only those children who survived the niece and attained twenty-one, took vested interests. —*Williams* v. *Haythorne*, L. R. 6 Ch. 732.

13. Part of the assets of two partners consisted of leaseholds, the legal estate in which was vested in them as joint tenants. One partner died bequeathing all his share of the leasehold premises to his partner. The partnership assets were insufficient to pay its debts, though each partner's estate was amply solvent after paying such debts. *Held*, that the surviving partner took a moiety af the assets subject to the application of the same in payment of partnership debts, and that he could not call on the testator's estate to exonerate the assets from such charge.—*Farquhar* v. *Hadden*, L. R. 7 Ch. 1.

See Devise; Joint Tenancy; Mortmain.

Belligerent.—See Prize; War.

Bill in Equity.—See Equity Pleading and Practice, 2.

Bill of Lading.—See Bankruptcy, 2; Charter-party, 3.

Bills and Notes.—See Bankruptcy, 2; Equity, 2; Proof—Surety.

Broker.

1. The defendant, as selling broker, made a contract for his principal in the following terms: "October 26, 1869. Sold by order and for account of P. [his said principal] to my principals, S. & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker, to be de-

livered here in London, at 22s. per cwt. D. pd. Shipment, November or December, 1869." Raisins arrived, which the defendant rejected as not of fair average quality, though it appeared they were of fair average quality for the year 1869. *Held*, that whether by the contract the raisins were only to be of fair average quality for the year 1869, or fair average quality generally, the defendant had acted merely as a *quasi* arbitrator, and was in no event liable for an error of judgment. *Pappa* v. *Rosa*, L. R. 7 C. P. 32.

2. A broker purchased hemp for B., signing a contract note as follows: "Bought for B. of our principals 200 tons of hemp," and signed by the broker. The broker had no principal, but B. had no notice of the fact. *Held*, that the broker could not sue B. on said contract note, as the contract was with an unnamed principal and not with the broker; and as the broker, if one of contracting parties, could not sign as agent of B., the other party.—*Sharman* v. *Brandt*, L. R. 6 Q. B. (Ex. Ch.) 720.

See Charter-party, 1.

Canal.—See Statute.

Capture—See Charter-party, 2, 3; Prize.

Cargo—See War.

Carrier.—See Lien.

Charge.—See Power, 1.

Charitable Institution.

A testatrix left property, consisting of pure and impure personalty, to the Dominican Convent at C., and to the Sisters of the Charity of St. Paul at S., payable to the superior for the time being in each case. The convent was an institution of Roman Catholic females living together by mutual consent in celibacy, under a common superior, for the purpose of sanctifying their souls by prayer; and said Sisters of Charity formed an institution consisting of women living together by mutual consent, whose primary object was personal sanctification, and who as a means thereto employed themselves in works of piety and charity. *Held*, that the gift to the Convent was good as to both the pure and impure personalty; and that the gift to the Sisters being to a charitable institution was good only as to the pure personalty.—*Cocks* v. *Manners*, L. R. 12 Eq. 574.

Charity.—See Bequest, 10.

Charter-party.

1. A Norwegian vessel was advertised in England to sail as a general ship by parties signing themselves "brokers." The plaintiff, in accordance with agreement with said brokers, put goods on board to be carried at a certain freight, but the master refused to sign bills of lading except subject to the terms of a charter-party between the owners and the above brokers who were the charterers. The charter-party, of whose existence the plaintiff was ignorant when he entered into the agreement with the brokers, gave the owner a lien for freight, dead freight, and demurrage. The owners claimed a lien for demurrage. *Held*, that the plaintiff was not bound to inquire whether there was a charter-party, and that the owners had no lien.—*Peek* v. *Larsen*, L. R. 12 Eq. 378.

2. The master of a German vessel agreed with a firm in Constantinople by charter-party in the English language to carry a cargo, stopping at Falmouth for orders, and thence within certain limits as directed, the act of God, the queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during said voyage, always mutually excepted. After signing the charter-party and bills of lading, war was declared between France and Germany. The vessel arrived at Falmouth, August 8, and then communicated with the charterers' agents. On September 3, the master received orders to go to Leith, which he said he would do on the first favorable opportunity. He waited for a wind which would be fair for leaving the port and enabling him to run if he saw a French cruiser. There were at the time French cruisers in the neighborhood, and there was a real risk of capture. Suit was instituted against the vessel September 15, for not proceeding, and she was arrested September 21. *Held*, that by either English or German law the delay of the master was justified by the terms of the charter-party.—*The Heinrich*, L. R. 3 Ad. & Ec. 425.

3. *The Patria*, a German vessel, was chartered to a German firm for a voyage from the west coast of Central America back to certain ports on the continent, or in Great Britain, and the charter-party provided that the master should not be responsible for events caused by high powers. While the vessel was at Gautemala, coffee was shipped on her by a Spaniard, who, having no notice of said charter-party, received from the master bills of lading in English, under which the coffee was to be delivered at Hamburg, dangers of the seas only excepted. The vessel touched at Falmouth, and there learned that war had broken out between France and Germany, and that Hamburg was blockaded. Correspondence ensued between the master and the consignees, and the latter did not require the vessel to sail during the

continuance of the blockade, which lasted until September 18. After this date the consignees required deliverance of the coffee at Hamburg, or at Falmouth, they offering to pay full freight. The master refused to deliver, and remained at Falmouth until November 7, when this suit was instituted. Up to and after this date French cruisers in the British channel subjected German vessels to the risk of capture. *Held*, that neither by English nor German law could the terms of a charter party, of whose existence the shipper was ignorant, be imported into the bill of lading, and that the vessel was bound to proceed to Hamburg in spite of risk of capture. Also, that by English law the consignees were entitled to the coffee, either with or without payment of *pro rata* freight, on the master's refusing to proceed to Hamburg; and that under either the general maritime law or the law of Germany, payment of full freight entitled the consignees to the coffee.—*The Patria*, L. R. 3 Ad. & Ec. 436.

Class.—See Bequest, 5, 12.

Codicil.—See Devise, 1, 2.

Collision.

A collision occurred between two vessels, the G. and the E., by fault of the former, and the latter's main and fore mast soon went by the board. Afterward a pilot-boat fell in with the E., and attempted to tow her, but failed; the seaman of the E. might have got on board this vessel at great peril, but they stayed by the E., which was subsequently wrecked. Two of the E.'s men were drowned, and the others were injured. One of the drowned men left a widow with a child *en ventre sa mere*. *Held*, that the deaths and injuries were the natural and proximate consequences of the collision That it was the seamen's duty to stay by the ship while there was reasonable chance of preserving her, but that if they would have been justified in going on board the pilot-boat, the danger therein created an alternative peril, and that therefore there was no negligence, in the seamen, whichever alternative was adopted. Leave was reserved to the infant *en ventre sa mere* to claim damages if born alive within due time.—*The George and Richard*, L. R. 3 Ad. & Ec. 466.

See Damages, 2.

Common.

1. Where freeholders have for a long-continued duration enjoyed a right of common the court will if possible find a legal origin of such right. Where certain freeholders sued on behalf of themselves and all the other tenants of a manor for infringement of rights of common, it was presumed that there was a grant common to all with rights in common, and that they were therefore entitled to join in said action. Such freeholders did not forfeit their rights by ceasing to pay quit rents or render suit and service.—*Warrick.* v. *Queen's College, Oxford*, L. R. 6 Ch. 716.

2. In a case similar to the above, it was *held* that a freeholder might sue on behalf of the freeholders only, even though there were copyholders with rights co-extensive with those of the freeholders; and he might sue on behalf of both.—*Betts* v. *Thompson*, L. R. 6 Ch. 732.

Common Carrier.—See Lien.

Company.

1. In 1864 the M. and L. banks entered into agreement for dissolution of the latter with transfer of its good-will to the M. bank. The M. bank to increase its capital, and 10,000 shares at £10 per share to be allotted at par to the directors of the L. bank for distribution among its shareholders. The directors paid the £100,000, but only 9,740 of the 10,000 shares were taken by the shareholders. In 1866 a call was made by the M. bank, but not paid on the 260 shares not taken. In November, 1867, the L. bank asserted a right to a "large number of shares that had not been applied for," but the M. bank replied that it could not now admit that right. In 1868 the L bank demanded allotment of said 260 shares, which was refused. In 1869 the M. bank was wound up, returning £5 per share to its stockholders, and the L. bank claimed such sum per share on said 260 shares. *Held*, that the agreement had been that if there were 10,000 shares there should be 10,000 subscribers, and that said agreement was now incapable of specific performance. Claim dismissed.—*In re Mercantile and Exchange Bank. Ex parte London Bank of Scotland*, L. R. 12 Eq. 268.

2. A bank issued a prospectus stating falsely among other things that 80,000 shares had been subscribed. In June, 1865, W. trusting in said statement, was allotted shares in said bank, and in July obtained a certificate certifying that he was a holder of the shares and was registered a member of the bank. An application by the bank to the Stock Exchange for a settlement day was refused, and subsequently the shareholders resolved that all persons to whom shares in the bank had been allotted, were entitled to have their allotments cancelled and their money returned. W. returned his share certificates, and received on November 2, a check for the amount paid by him upon his allotment. In the register of

shareholders was written opposite his name, "Money returned and allotment cancelled." By articles of said bank the directors had the power to accept the surrender of shares. On November 22, the bank was ordered to be wound up. W. did not until after this day discover said misrepresentations in the prospectus. It was *held* (see *in notis*), that W. should not be put on the "A" list of contributories as the said cancellation was tantamount to a surrender. On the present application to place W. on the "B" list (of those who had been shareholders): *Held*, that W. must be placed on said "B" list, as he had not, before winding up began, elected to have his *allotment* cancelled because of said misrepresentation in the prospectus.—*Wright's Case*, L. R. 12 Eq. 331.

3. The name of H. appeared as director in a prospectus of a company, and he was present at a meeting of the board of directors where a committee was formed to make allotment of shares. Fifty shares, necessary by the articles of association to qualify a director, were allotted to H. without his knowledge, or notice given him. He had not read said articles. H. also signed a check as director, but his name was treated by the bank as insufficient as it had not been sent in as sufficient for that purpose. *Held*, that H. had acted as director, and incurred the obligation of taking said fifty shares. —*In re Great Oceanic Telegraph Co., Harward's Case*, L. R. 13 Eq. 30.

4. By articles of association a company's funds were not to be applied to expenses until a certain number of shares were subscribed, and the plaintiff was to be paid for services as promoter of the company, "so soon as the company shall be in a position to commence business." The shares were subscribed. *Held*, that the company was in a position to commence business, although it had not even a site for its proposed buildings.—*Touche* v. *Metropolitan Railway Warehousing Co.*, L. R. 6 Ch. 671.

5. The A. company by consent of all its shareholders and agreement with the M. corporation amalgamated and transferred its business to the latter. The company had no power by its deed of settlement to effect this amalgamation. Subsequently the company executed a deed with the corporation for resuscitating the former, and terminating its previous agreement. A former stockholder in the company after said deed transferred his shares. *Held*, (Mellish, J., dissenting), that by said amalgamation and transfer, the shares in the A. company ceased to exist as such, and there could be no resuscitation and subsequent transfer of the same.—*In re Accidental Death Insurance Co., Chappell's Case*, L. R. 6 Ch. 902.

6. R. agreed to become district manager of an association, a condition precedent being that he should take twenty-five shares in the association, R. applied for the shares, paying a deposit of £1 per share, and they were allotted to him; he was appointed manager and received notice of the appointment and accepted the same. *Held*, that there had been sufficient notice of allotment.—*Richards* v. *Home Assurance Association*, L. R. 6 C. P. 591.

See Equity, 1; Lien, 1; Security, 1; Ultra Vires.

Concealment.—See Insurance, 3.

Condition.

A testatrix gave certain property to the wife of H., who lived at S., and in a codicil directed that said property should go over in case the wife should not cease to reside at S. within eighteen months of the testatrix's death. *Held*, that the condition being to omit what was a duty, was void.—*Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604.

See Bequest, 1; Sale.

Condonation.

Condoned incestuous adultery is revived by adultery not incestuous, and, it appears, by any other marital offence.—*Newsome* v. *Newsome*, L. R. 2 P. & D. 306.

Consolidation.—See Company, 1.

Construction.—See Bequest; Broker, 1; Charter-party, 2, 3; Company, 4; Damages, 1, 2; Devise; Executors and Administrators, 2; Lien; Limitations, Statute of, 1; Partnership; Power, 1; Prize; Railway; Reservation; Reversionary Interest; Statute; Trust, 1; Ultra Vires; Way, 4.

Contingent Interest.—See Reversionary Interest.

Contract.

Where it was provided in a contract between a builder and his employer that questions between them should be settled by award of the architect of the building, and the architect had agreed with the employer that the building should not cost over a certain sum, which agreement was unknown to the builder, it was *held* that the above provision was not binding. —*Kimberley* v. *Dick*, L. R. 13 Eq. 1.

See Broker; Charter-party, 2-4; Company, 4, 5; Frauds, Statute of; Limitations, Statute of; Salvage, 1; Specific Performance, 1; Ultra Vires.

Contribution.—See Bequest, 13.

Contributory.—See Company, 2.

Conveyance.—See Reservation.

Copyhold.—See Common, 2.

Corporation.—See Company, 5.

Counsel.—See Mortgage, 4; Trust, 2.

Covenant.—See Surety, 1.

Cumulative Legacy.—See Bequest, 9.

Damages.

1. By statute, a company must keep water pipes charges with water at a certain pressure and allow persons to use the same for extinguishing fires; failing in such duty the company to be liable to a penalty, and a forfeiture of 40s. per day to every rate-payer. *Held*, that a person whose premises were burned by reason of neglect of the company to provide water, might sue for damages for the same under the act, although a penalty and forfeiture were provided in such cases; and that the damage was not too remote.—*Atkinson* v. *Newcastle & Gateshead Waterworks Co.*, L. R. 6 Ex. 404.

2. By statute, the Admiralty court has jurisdiction over any claim for damage done by any ship. *Held*, that a claim for personal injury resulting from the death of the master of a vessel, caused by collision of said vessel with another, was not "damage" within the statute. —*Smith* v. *Brown*, L. R. 6 Q. B. 729.

See Collision; Pleading.

Debenture.—See Trust, 1.

Dedication.—See Way, 2.

Deed.—See Mortgage, 3.

Defamation.—See Libel.

Demurrer.—See Bequest, 1; Equity Pleading and Practice; Libel; Negligence.

CORRESPONDENCE.

Attorney and Client—Privileged communications.

To the Editors of the Canada Law Journal.

Gentlemen,—I have carefully read over your observations respecting privileged communications between attorney and client in criminal matters, and you will excuse me for saying that I am not satisfied with them, and that they do not appear to bear upon this question at all. So far as such communications apply to matters of a civil nature, I agree with you that they are privileged. But the question is very different when it has reference to transactions affecting the public, and which public policy requires should not be concealed. In other words, such transactions are not privileged. The privilege which you appear to contend for, on behalf of attorney and client, does not extend to the members of any other calling or profession, and why, as a matter of abstract right, should it be granted exclusively to the members of the legal profession? The same arguments which you make use of in favour of the latter, might be used with greater force in reference to ministers of religion, because in the latter case a criminal might claim the right of unburdening his guilty conscience to his spiritual guide with a view of spiritual advice and reformation, while, in so far as members of the legal profession are concerned, such communications are solely made for the purpose of legal defence against a public demand for conviction and punishment. I do not think that the exercise of the privilege which you contend for, would be in any way advantageous, morally speaking, to the members of the legal profession, or that they should exclusively claim the privilege. Members of the legal profession are also members of society, and, as members of society, they cannot, by simply assuming their particular calling, divest themselves of their obligations to the public and claim thereby privileges which, upon considerations of public duty they ought not to possess.

In Taylor on Evidence, 3rd ed., p. 753. "If from independent evidence it should clearly appear that the communication was made by the client for a criminal purpose, as for instance, if the attorney was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence, it is submitted that, on the broad principles of penal justice, the attorney would be bound to disclose such guilty project. Nay, it may reasonably be doubted whether the existence of an illegal purpose will not also prevent the privilege from attaching, for it is as little the duty of a solicitor to advise his client to evade the law as it is to contrive a positive fraud." And in Note 2, same page, reference is made to several cases bearing upon the subject. Also, same note, "In *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1229, Serjt. Tindall," in argument, lays down the rule thus: "If the witness is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with the universal one, which lies on every member of society, to discover every

design which may be formed, contrary to the laws of society, to destroy the public welfare. For this reason, I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a case wherein he is concerned, the obligation to the public must dispense with the private obligation to the client." Two of the learned judges, who tried that remarkable case, Bowes, C.B. and Mounteney, B., expressed the same sentiments, p. 1240, 1243. See also *Gartside* v. *Outram*, 26 L. J. Ch. 115, per Wood, V.C.

In Greenleaf on Evidence, 11th ed., p. 332, note 3: "This general rule, privilege, is limited to communications having a lawful object, for if the purpose contemplated be a violation of law, it has been deemed not to be within the rule of privileged communications, because it is not a solicitor's duty to contrive fraud, or to advise his client as to the means of evading the law." *Russell* v. *Jackson*, 15 Jur. 1117; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. R. 528.

Other authorities might also be given, but I consider the above sufficiently establish my proposition. A.

[Our correspondent asks why privilege should be granted to members of the legal profession, as a right, respecting communications with their clients in criminal matters? Whole essays have been written upon this subject; at present it is enough for us to reply in the language of Lord Brougham: "It is founded on a regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case." *Greenough* v. *Gaskill*, 1 M. & K. 103. A. cannot surely seriously argue for a return to the old law when prisoners were not allowed counsel—he cannot mean to contend that the Statute granting them this right was a mistake and should be repealed. What proposition of A.'s do his authorities establish? That a counsel, after being retained by a person charged (for example) with murder, after having heard all the details of his story under the seal of professional confidence, is forthwith to tender himself as a witness and convict his unhappy client? The language of Mr. Baron Mounteney, in one of the cases A. cites, confutes this: "Whatever either is or by the party concerned can naturally be supposed necessary to be communicated to the attorney in order to the carrying on any suit or prosecution in which he is retained, that the attorney shall inviolably keep secret." *Annesley* v. *Anglesea*, 15 St. Tri. 1242. The question is not as to whether the retainer is or is not to be accepted, but one in which the professional relationship exists. Now, what is established by A.'s citations is just neither more nor less than what we adverted to in our former article: *ante* p. 75. We said, "If the communication is made not as between client and professional adviser, nor in the usual course of business, or for a fraudulent or illegal purpose, then it is not protected." Now, it is not in the attorney's usual or proper course of business to concoct a fraud or give advice upon the way to evade the law, or to assist a man in contravening the law. In such cases the solicitor is viewed by the court as a co-conspirator, and no privilege attaches. See *Charlton* v. *Coombs*, 4 Giff 380. So in the case from the State Trials, one of the defendant's declarations to his attorney was, (speaking of the plaintiff,) that "he did not care if it cost him £10,000 if he could get him (the plaintiff) hanged." The judges held that this was not such a communication as any man living could possibly suppose to be necessary for the carrying on of the prosecution in question. Therefore, according to Mounteney, B., the attorney was not only at liberty to disclose it, but it was his duty to make it known, as indicating an abominable endeavour to make away with a man's life. According to Dawson, B., the client went beyond what was necessary, and entrusted the attorney with a secret, *not as an attorney, but as an acquaintance*, so that the privilege did not attach. As we said before, the law is well settled on the subject, and may be found in any text book, as A.'s letter demonstrates. If, however, A. is not satisfied, and thinks that an attorney should be a competent

witness in criminal trials against his own client upon a matter affecting the guilt charged, we advise him to get the point before the judges, by tendering himself on a suitable opportunity before, say, Chief Justice Hagarty or Mr. Justice Galt.]—Eds. L. J.

Married Women—Replevin.

To the Editors of the Canada Law Journal.

Gentlemen,—E. H., a married woman, on the 3rd May, 1872, put up at the hotel of J. T., bringing with her trunks containing her clothing and that of her children, who accompanied her, and some books. Upon leaving, J. T. refused to allow her to take her trunks, claiming a landlord's lien thereon for a hotel bill owing him by her husband for board, &c., which debt had been contracted by him some time previously. E. H. applied to the County Judge of the county of Peterboro' for an order for a writ of replevin, upon her affidavit, following Con. Stat. U. C. cap. 29, and 23 Vic. cap. 45, stating that she was the owner of the trunks, containing, &c. (describing the principal articles), the value of the goods, and that the same were in the possession of J. T., who wrongfully detained them, claiming, &c. (as above). The Judge granted a summons in the first instance, and, upon the argument, refused to make the order, on the ground that it should appear from plaintiff's affidavit how she, being a married woman, acquired the goods as owner. Plaintiff's attorney contended that plaintiff, having made the affidavit required by law, had made a *prima facie* case, and was entitled to the order, unless J. T. could show an existing lien in law; but the contention was overruled. Plaintiff is now driven to an action of detinue or trover.

Would you kindly give the above a place in your next issue, with your opinion as to the correctness of the learned Judge's ruling, and as to whether there is any other form of affidavit prescribed by law to meet the case of married women, plaintiffs in replevin: also whether the Act of last session, with respect to the rights of married women, places them upon any different footing than they formerly were with regard to applications of this kind?

And greatly oblige yours, &c.,

Attorney.

Peterboro', May 8, 1872.

[As we understand it, the affidavit in this case was drawn so as to be within the provision of 23 Vic. cap 45, sec. 1, sub-sec 1. Under this clause it is to be *shewn to the satisfaction of the judge* that the person claiming the property is the owner, or is lawfully entitled to the possession thereof. We cannot say that the judge was wrong, as a matter of practice within his decision, in requiring that the facts shewing the title of the married woman to the property, and giving her the right to claim its recovery in her own name should be set forth on the affidavit. Before the Ontario statute of last session, she would not have had the right to sue as a *feme sole*—she can by virtue of that Act sue in her own name for the recovery of property declared by that or any other Act to be her separate property. We think she should shew sufficient facts in her affidavit to bring her within the Act. As she would have to establish such a state of facts at the trial, the judge was not unreasonable in requiring something more than her mere affirmation that she was the owner, especially as his order to replevy is equivalent to a judgment in the first instance.—Eds. L. J.]

Insolvency—Double proof.

To the Editors of the Canada Law Journal.

Gentlemen,—In the case of *Re Dodge et al., Insolvents, and Budd, an Insolvent*, reported in your February number, p. 51, and referred to in March number, p. 57, has not the effect of the 60th section of the Insolvent Act of 1869 been overlooked?

The language of the judgment of the court in *Re Chaffey*, 30 U. C. Q. B. 64, leads almost irresistibly to the conclusion that had the court been able to decide that case under the Act of 1869—in other words, had the proceedings therein been taken subsequently to that Act coming into force—the double proof would have been allowed, subject to deduction in respect of the value of the endorsement.

Compare subsection 5 of section 5 of the Insolvent Act of 1864, with section 60 of the Act of 1869. It may be useful in this connection to remark that the rule against double proof has been refused to be extended to a case where one of the proofs was made under a decree for the administration of the trusts of a deed for the benefit of creditors, *ex parte Thornton*, 3 De G. & J. 454, followed by the Master of the Court of Chancery for Ontario

in the recent case of *In re Baker*, *Baker* v. *Dawbarn*, not yet reported, where one of the proofs was made under an administration order granted under 467 of the Consolidated Orders in Chancery.

Useful summaries of the law on this point, at it stood before the Act of 1869, with reference to the cases, may be found in 1 Archb. Bankruptcy Laws, 673, et seq.; 2 Doria & Macrae Law of Bankruptcy, 831, et seq.; 1 Deacon, Law of Bankruptcy, 845, et seq.

Yours truly,

S. G. Wood.

Toronto, May, 1872.

[We are indebted to the courtesy of the learned Master of the Court of Chancery for a report of the case of *In re Baker*, referred to by Mr. Wood. We publish it in the present number, as a valuable addition to the learning on the subject referred to.]—Eds. L. J.

REVIEWS.

Registration of Written Instruments affecting Title to Real Estate. By Samuel D. Sewards, LL.D. New York: Baker, Voorhies & Co., 1872.

This is a brief essay of 26 pages, which deals with the subject under three heads. (1) Historical sketch of the recording of written instruments. (2) Defects in the system of recording prevalent in the States. And (3) Proposed plan of improvement. We learn that in the Plymouth Colony conveyances, including mortgages and leases, were required to be recorded as early as 1636. In 1641, Massachusetts, by statute, required all deeds of conveyance, whether absolute or conditional, to be recorded, that "neither creditors might be defrauded nor courts troubled with vexatious suits and endless contentions." This sounds very like a practical anticipation of Cromwell's advice, that the laws should be "plain, short, less chargeable to the people, and for the good of the nation."

According to our author, the great defect in the system is that which was predicted by Lord St. Leonards, (who, by the way is always styled "Lord St. Leonard") viz.: "That the number of deeds requiring registry would destroy the plan by its own weight." The proof he adduces is, that in the Registry Office of the City of New York, the record of *conveyances* alone, in the City and County of New York, fills a vast library of nearly twelve hundred books, averaging six hundred pages each, over a foot and a half long by a foot wide, of closely-written registrations, which are the accumulations of the last few years only. Add to this a like number of of books containing the registration of incumbrances, and others for powers of attorney and miscellaneous instruments. The consequence is that everything depends on a correct index. If any mistake occurs the holding of the courts is that the false and misleading index is no defence to the person led astray.

One chief means of improvement proposed is the discarding, in conveyancing forms, of all matter which is redundant, inexpressive and useless. As a further mode of simplifying the deed, it should contain the names of the covenants only, and to this end legislative interference is invoked to provide a short statutory form. This, in effect, is just recommending such an amendment of the law as has long been in force in this province by our adoption of the English Acts relating to "Short Forms." No doubt these statutes are open to many objections on the part of the scientific lawyer; and are specially unsuitable to the complicated state of title which is the rule in England. But for practical purposes, and in the light of expediency, these statutes are by no means to be held in contempt, and they really serve suitably almost every purpose in a new country such as ours, where land is more an article of commerce than it is in "the old country."

The other suggestion is that the deeds be not copied *in extenso*, but that the originals be filed, certified copies returned to the holder, and that reference be made to their principal parts in one book for all conveyances and incumbrances. This book is to be so arranged that every parcel of land shall have its separate folio, containing the description of the property and the name of the owner, who, on the principle of mercantile book-keeping, is to be credited with the title he possesses, and charged with the incumbrances thereon. A condensed record would thus be obtained, which would shew at a glance the state of the title, or give, as it were, a bird's eye view of it. It will be seen, again, that this is very much the result which is reached by our pre-

sent registry system. It speaks well for the forethought of the registrars of Ontario (who, we understand, framed the scheme which is embodied in our last Registry Act) that they have planned a system which is not only the most advantageous and easy of reference for the present time, but one which is likely to be efficient when we have cities rivalling New York in magnitude.

There are many hints scattered through this essay which will be useful to those engaged in the work of registration. We can speak favourably of it as the fruit of experience and much well-expended research.

The Maryland Law Reporter. Baltimore. No. 1. 1872.

We welcome into the field of legal journalism a new venture, styled *The Maryland Law Reporter*, a daily paper, published at Baltimore. It certainly sets forth a most ambitious programme, and indicates a more advanced enterprise than any other professional publication. Whether it will pay or not, the future will prove; but if all subsequent numbers are like the first, which is before us (of date May 13th), we can be assured of one thing—that it deserves adequate pecuniary support. The legal news is varied and well selected; while in point of the early reporting of important decisions, it will be manifestly ahead of all its hebdomadal contemporaries. From its pages we make the following extract, which manifests how awkward it may be to have the progress of a criminal trial interrupted by Sunday:

"A remarkable legal point has been raised in the case of Marlow, the Jamestown murderer, who was to have been hanged a few weeks ago, but obtained a stay of proceedings, granted by Judge Barker of the Supreme Court. It appears that a Sunday intervened during the trial and after the evidence was closed. By order of the court the jury were kept together in the custody of the officers, who permitted them to attend the Baptist church in Maysville. This afforded an opportunity not to be neglected by the clergyman who officiated on that occasion, and he proceeded to preach a sermon having a practical application to the case which the jury had under consideration, taking for his text the words, "Release unto me Barabbas; now Barabbas was a robber." During his discourse the minister said, "Some in this house may think I am pleading for mercy for the man now being tried for his life in this village. Such is not the case, for I believe the man's hands are reeking with blood; also his wife's and her mother's reeking with blood. I have read and carefully examined the evidence, and from that have come to this conclusion." Marlow's counsel very naturally assumes that it was not fair to his client that the jury should have been preached to in such a strain, and he has obtained a stay of proceedings on that ground."

And also this other selection, which affords an apt illustration of the maxim, "*Summum jus, summa injuria*," not commented upon in Broom, but which, according to Sir Henry Hobart, is "spoken of elegantly in Ecclesiasticus, chap. 19" (Hob. 125 a):

"A singular case has lately been decided in the United States Supreme Court. John Henderson had bought one hundred barrels of whiskey in a bonded warehouse, in Missouri, from the distiller, and had paid the regular Government tax on it. But after he had bought the whiskey and paid the taxes, and after the Government, through its collector, had received the taxes, a seizure was made of the goods, on the ground that their former owner, the distiller, in removing them from the distillery to the bonded warehouse, had intended to defraud the Government. It was not alleged that any fraud was accomplished, or that the owner of the whiskey, at the time it was seized, had been privy to the alleged unfulfilled intent to defraud. The goods were at no time beyond the supervision and control of the Government officers, and every dollar of taxes due on them had been paid by Mr. Henderson before removing them from the bonded warehouse. And yet, under the fourteenth section of the Internal Revenue Act, the collector declared the goods forfeited in consequence of an intention, not an act, of the previous owner; and the majority of the Supreme Court has sustained this proceeding. The result is, that the United States gets the full tax on the spirits and the spirits besides; the innocent owner loses his whiskey and the taxes he has paid on it; while the only person connected with the transaction who is charged with doing, or intending to do wrong, goes free and retains the money he received from Mr. Henderson for the whiskey which the Government has taken. The Chief Justice, Justice Field and Justice Miller dissented from this apparently unjust decision."

DIARY FOR JULY.

1. Mon.. *Dominion Day.* Long Vacation begins.
   County Court Term begins.
   Heir and Devisee Sittings commence.
   Last day for County Council to equalize assessment rolls.
   Last day for County Treasurer to certify taxes due on occupied lands.
6. Sat... County Court Term ends.
7. SUN.. *6th Sunday after Trinity.*
14. SUN.. *7th Sunday after Trinity.*
15. Mon.. *Swithin.*
16. Tues.. Heir and Devisee Sittings end.
21. SUN.. *8th Sunday after Trinity.*
24. Wed.. *St. James.*
28. SUN.. *9th Sunday after Trinity.*

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THE

Canada Law Journal.

JULY, 1872.

We are glad to see the Chief Justice of Ontario home again, and looking all the better for his holiday.

We clip from the English *Law Journal* a paragraph relating to Nisi Prius references, every word of which is applicable to our system, in the hope that some of our many legal members of Parliament may frame some fitting legislative remedy:

"There is nothing incident to the proceedings of a court of law more unsatisfactory than the process of referring a cause to arbitration at Nisi Prius. The witnesses have come from a distance, the attorneys are in attendance, the counsel have had their fees paid. Gradually, however, as the leading counsel for the plaintiff opens his case to the jury, the newspaper rises higher and higher before the judge's face, till at last his Loreship is entirely hidden from view—a sure sign that the case will ultimately be referred, and the parties have to begin over again. Judges are in the habit of saying that they are justices of a Superior Court, and not public accountants, and therefore they will not try certain cases. But as the law now stands, if both parties to an action desire it to be tried in the ordinary way, a judge and jury often stand very much in the position of accountants. Moreover, the evil is not simply the almost entire waste of the costly proceedings previous to the day of trial. The arbitrator appointed is probably a man with a hundred other things to do, who gives the reference a day in one week and a couple of hours in the next, till, as the case drags on, the unfortunate litigant thinks the arbitrator, who delays his case, rather more vexatious than the judge who refused to try it. Such a state of things surely calls for an amendment of the law."

It is well that prominence should be given to one of the unwritten rules of the Court of Chancery, which the Chancellor adverted to in *McLean* v. *Cross*, 3 Ch. Cham. R. 440: this, namely, that local Masters and Registrars are not to practice their profession in partnership with any solicitor who is at the time a practitioner in Chancery. They are not to do this even although they may not actually share in the emolument of suits. The reason is obvi-

ous: that the partner of the local Master may not have undue preference in the estimate of clients, or the appearance even of an undue advantage over his fellow-practitioners; and, specially, that an officer of the Court may not have to deal with cases in which he is to some extent personally interested.

The *Morning Post* says it is rumoured that Lord Chancellor Hatherley will very shortly retire, to be succeeded by Lord Romilly, (the present Master of the Rolls) who will himself be succeeded by Sir Roundell Palmer.

Here is the way Yankee juries treat a recalcitrant juryman. In Rockland County, N.Y., during the Supreme Court Circuit, a jury went out to determine upon a verdict. After wrangling a whole day and failing to agree, they were discharged by the Court. Subsequently the following prayer for relief, signed by ten members of the jury, was solemnly preferred to the Court: "We the jurors in the above trial, hereby petition this honourable Court to order the name of —— out of the jury-box for the following reasons: In our opinion he is the most stubborn and contrary man that the Almighty ever made, and is not fit to sit as a juror in any case. He was never known to agree to any question of law with either judge or juror."—We have no doubt this persecuted citizen went home after the trial and told his wife that he had been struggling all day against eleven mule-headed men who would not listen to reason.

LAW SOCIETY OF ONTARIO.

Easter Term—1872.

The following is a *resumé* of the proceedings of Convocation, during Easter Term, published by order of the Benchers.

Monday, 20th May.—The usual oral examinations of the Articled Clerks and Students-at-Law, were proceeded with and concluded.

Tuesday, 21st May.—The Report of the Examining Committee was received.

The Treasurer laid on the table a letter from Rolland Macdonald, Esq., Q.C., resigning his seat as a Bencher.

Ordered, that the resignation be accepted.

Messrs. Patterson, Crickmore and Meredith were appointed a Committee to examine the Journals and report the names of any Benchers who have failed to attend the meetings of the Benchers for three consecutive Terms.

The Committee so appointed reported that they had examined the Journals, and found that Miles O'Reilly, and Albert Prince, Esquires, elected Benchers, had failed to attend any meetings of the Benchers for the three consecutive Terms of Easter and Michaelmas, 1871, and Hilary, 1872.

Ordered, that the Report be adopted; that the Secretary do notify Messrs. Miles O'Reilly and Prince, that in consequence of their non-attendance at any meeting of the Benchers of the Law Society for three consecutive Terms, they have ceased to be Benchers under 34 Vic. ch. 18.

Ordered, that a special meeting be called for Thursday, 30th instant, for the election of two Benchers, in place of Miles O'Reilly and Albert Prince, Esquires, and for the consideration of such other business as may be brought before the meeting.

Examining Committee for next Term to be Messrs. Patterson, Harrison, Mackenzie, Crawford, and Meredith.

Abstract of Balance Sheet for first quarter of 1872, laid on the table.

Abstract of Balance Sheet for First Quarter of 1872.

INCOME.

Call Fees	$1,360 00	
Certificated Fees	1,477 00	
Admission Fees	1,188 00	
Term Fees	104 00	
Attorney Examination Fees	504 00	
Sale of Reports	252 00	
Government Warrant	1,500 00	
		$6,385 00

EXPENDITURE.

Reporters' Salaries	$1,750 00	
Salaries	675 00	
Scholarships	120 00	
Admission Fees returned	252 00	
Secretary and Examiners' Fees up to Feb. 20	297 85	
Term Fees returned	2 00	
Office	10 47	
Grounds	3 25	
Hall	551 65	
Library	412 46	
Call Fees returned	486 00	
Attorney Examination Fees returned	160 00	
Reports, Printing of	1,349 65	
Insurance	782 78	
Law Expenses	391 42	
Law Journal Account	81 00	
		$7,325 53

Expenditure less Income ..		90 534
Outstanding Assets—Cash.	66 18	
Bank deposits	14,401 61	
Debentures, Currency	4,000 00	
Special deposit	10,200 00	
		$28,667 79

May 25th.—The Hon. John Hillyard Cameron was unanimously re-elected Treasurer for the current year.

The nomination of the several Committees of Convocation was adjourned until Thursday, the 30th of May.

Thursday, May 30th.—M. R. Vankoughnet, Esq., of Toronto, was elected a Bencher in the room of Miles O'Reilly, Esq., to serve for the residue of his term.

James Maclennan, Esq., of Toronto, was elected a Bencher in the room of Albert Prince, Esq., to serve for the residue of his term.

Messrs. Sinclair, Patterson, and McCarthy were appointed a Committee to report Standing Committees for current year.

The Committee so appointed reported as follows:—

"Your Committee appointed to strike Committees, beg to report the following names.

For Finance Committee:

Mr. Crawford, Mr. Patterson, Mr. Read, Mr. Sinclair, Mr. Vankoughnet.

For Reporting Committee:

Mr. Armour, Mr. Blake, Mr. Maclennan, Mr. McCarthy, Mr. M. C. Cameron.

For Library Committee:

Mr. Blake, Mr. Crickmore, Mr. Harrison, Mr. Mackenzie, Mr. Meredith.

For Legal Education Committee:

Mr. Benson, Mr. Burton, Mr. Moss, Mr. Palmer, Mr. Patton.

And your Committee would submit to Convocation, that it would be advisable to enlarge the number of each Committee to seven, leaving the quorum to be three as at present; and in the event of this suggestion being adopted, your Committee propose the following additional names, viz.:—

Finance—Mr. O'Reilly, Mr. Pardee.

Reporting—Mr. Bell, Mr. Moss.

Library—Mr. Becher, Mr. McMichael.

Legal Education—Mr. Armour, Mr. Patterson.

All which is respectfully submitted.

(Signed,) C. S. Patterson,
Chairman.

30th May, 1872.

Resolved, That the Report as amended be adopted.

Resolved, That all Standing Committees shall consist of seven members, with three as a quorum.

Resolved, That the Reports of the Courts of Law and Equity shall be conducted by an Editor in Chief and a Reporter for each of the Superior Courts.

Resolved, That the salaries of the Reporters shall be as follows: Editor in Chief, sixteen hundred dollars; Chancery, twelve hundred dollars; Common Law, each Court, eight hundred dollars.

Resolved, That the office of Editor in Chief be offered to Christopher Robinson, Esq., Q.C.;

That the present Reporter of the Common Pleas be continued as Reporter of that Court;

That the present Reporter of the Court of Chancery be continued as Reporter of that Court;

That Mr. Henry C. W. Wethey, be appointed Reporter of the Court of Queen's Bench.

Resolved, That the salaries of the Reporters under the rules now adopted, come into operation on the first day of July, 1872.

Resolved, That on the removal of any Reporter by the Society, his salary shall cease upon his removal.

Resolved, That the Chamber Reports be continued to 1st July, 1872, and that the Chamber Reporters be paid on that day each the sum of three hundred and seventy-five dollars, in compensation for their respective appointments, and of all claims against the Society.

Resolved, That the Committee on Reporting shall prescribe the duties to be performed by the several Reporters and the Editor in Chief, and shall report thereon from time to time to Convocation.

Mr. Sinclair moved for a call of the Bench, for the re-consideration of the resolution for the continuance of the Reporter in Chancery, for the last Friday in Term, which motion was lost.

Resolved, That the Finance Committee be authorized to confer with the Government on the subject of the covenant of the Law Society for the maintenance and repair of the several Courts, and to complete a new agreement if they consider it advisable to do so, and report to the first meeting of Convocation afterwards, either in committee or otherwise.

Report of Finance Committee as to salary of Engineer received and adopted, and salary allowed at ($500) five hundred dollars per annum from 1st of April last.

Resolved, That the present messenger be allowed the sum of one hundred and eight dollars per annum in lieu of his fees formally paid him by students for admission and call.

Resolved, That the following be a standing order:

After the present term no person shall be appointed an officer of the society (other than ex

aminer) except after at least one week's notice by the Secretary of the intention to appoint, given by circular to each Bencher; provided that it shall nevertheless be competent for the Treasurer to temporarily fill any vacancies which the exigencies of the case may require to be filled.

The Rules on the subject of Legal Education were read a first, second and third time, and carried.

Resolved, That it be referred to the committee on Legal Education to report next Term on the subject of a Law School, and the system to be adopted under the statute of the last session respecting the Law Society.

Ordered, that the sum of fifty dollars be paid to Mr. Evans for his services as examiner this Term.

Ordered, that Mr. Evans be appointed examiner for next Term.

Resolved, That the Standing Committees shall meet on the rising of Convocation to elect chairmen.

Friday, June 7th.—The petition of Albert E. M. Loscombe was presented, but no action was taken on it.

The petition of Donald Greenfield Macdonald was presented, and the prayer of it was granted.

The letter of C. Robinson, Esq., Q. C., accepting the Editorship-in-chief of the Reports, both Law and Equity, was received.

Resolved, That the service of John Fisher Wood, under articles dated 18th of April, 1871, be allowed from that date, notwithstanding that the said articles were not filed in the office of the Clerk of the Crown and Pleas until 18th May, 1872.

Memorial of Salter J. Vankoughnet, Esq., received and read.

Resolved, That convocation accord to Salter J. Vankoughnet, Esq., the option of accepting or declining the offer of the Reportership of the Common Pleas till the first Tuesday of next Term, his performance of the duties under the new system, and at the reduced salary in the interval, not to be considered as prejudicing his position.

J. HILLYARD CAMERON,
Treasurer.

COURTS OF APPEAL.

The subject of appellate jurisdiction is one which is now attracting much attention, not only in England, but in the most important of her colonies. We print in another place the report of the Commissioners of Victoria, concerning the establishment of a Court of Appeal for Australasia. As to the Dominion, we gave our readers some time ago the draft of the Supreme Court Bill; but difficulties have arisen in the establishment of the Court from the fact that Quebec pursues a system of law different from that of the other Provinces. This is precisely the same difficulty in kind, though less in degree, which has long prevented the establishment in the mother country of a more satisfactory Court for colonial and other appeals than the Privy Council.

The Judicial Committee of the Privy Council as a Court of ultimate appeal has long occupied a very anomalous position. Its decisions, final and of supreme authority as regards the colonies, are yet not considered binding upon the superior courts of Great Britain and Ireland. Unlike the decisions of the House of Lords, as a Court of Appeal, which are authoritative declarations of the law to be followed in all Courts, not to be over-ruled by the House itself in subsequent appeals, not to be gotten rid of save by legislative interference; those of the Privy Council, while no doubt determining the particular case under appeal, are not necessarily to be followed in other cases involving the same point for adjudication.

That these observations may not seem exaggerated, let a few cases be noted as confirmatory of what has been advanced. Upon the construction of an Imperial Act of Parliament passed in 1861, giving the Admiralty jurisdiction in case of damage done to a ship, it was was held by the Privy Council that the term "damage" in the Act extended to a case of personal injury: The Beta, L. R. 2, P. C. 447. The Court of Queen's Bench declined to follow this decision, and have held upon demurrer to a declaration in prohibition that the term did not include injury of such a character: *Smith* v. *Brown*, L. R. 6 Q. B. 729. So, on an earlier occasion, in *The General Steam Navigation Company* v. *The British and Colonial Navigation Company*, L. R. 3, *Exch.* 330, the majority of the Barons thought themselves not bound to follow a prior decision of the Privy Council on a question of pilotage as reported in The Stettin: Brow and Lush, 199, 203; 31 L. J., P. D., and Ad. 208; From this view Kelly, C. B., dissented, on the ground that he did not feel himself at liberty to depart from the law laid down "by the overruling authority of the Judicial Committee

of the Privy Council, which, being a decision of a Court of last resort," should be taken to govern. Again: when upon the highly important question, as to whether Colonial Legislative Assemblies had inherent power to punish by imprisonment for a contempt committed outside the House, the Privy Council at first, in 1836, affirmed the doctrine that there was such a power: *Beaumont* v. *Barrett*, 1 *Moo.*, P. C. C. 59. But when, in 1842, another appeal came up, presenting the same matter for adjudication, the same Court delivering judgment through the same Judge, Parke, B., disaffirmed the existence of any such constitutional power as a legal incident in Colonial Houses of Assembly: *Kielly* v. *Carson*, 4 Moo., P. C. C. 63. This later opinion was adhered to when, for a third and last time, in 1858, the same question arose in *Fenton* v. *Hamilton*, 11 Moo., P. C. C. 347.

With this fluctuation of decision contrast the judicial position of the House of Lords as set forth in the language of Lord Campbell: "By the constitution of the United Kingdom, the House of Lords is the Court of appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals." *The Attorney General* v. *The Dean and Canons of Windsor*, 8 Ho. of L., C. 391. See also the language of Lord Eldon in *Fletcher* v. *Lord Sondes*, 1 Bligh, N. R. 144, 249, on the same point, and per James, V. C., in *Topham* v. *Portland*, 38 L. J. N. S., Ch. 513.

The *Solicitors' Journal* maintains that there are six points which are essential to the existence of a satisfactory Supreme Court of Appeal: It should be (1) single; (2) Imperial; (3) constant; (4) of weight corresponding to its authority; (5) reasonable rapid in action; and (6) not prohibitory in point of expense. Without commenting upon all these points, we may say, as to the first, there is no doubt it is extremely desirable to do away with the distinctions which we have shown to exist between the decisions of the two present Courts of ultimate appeal. The law as laid down by the one highest Court should be of validity for all purposes, in all Courts, and at all times, till changed by statute. In no other way can certainty in the law be reached. By the second requisite is meant that the members of the Court should be drawn not only from the English, but from the Scotch, Irish, and Colonial bench. In other words, that it should be in truth a representative court, where at least one of the judiciary body should be practically acquainted with each of the different systems of law which obtain over the wide-spread dominions of England. Only in this way, it seems to us, can the fourth requisite be secured; so that in learning and judicial experience, colonists may regard this tribunal as superior, not only in name, but in fact, to their own Provincial Courts. When Mr. Knapp first began, some thirty years ago, to report the decisions of the Privy Council, Sir John Leach, in his usual imperious style, refused to lend an ear to the new reports, at the same time acutely remarking that decisions regarding systems of jurisprudence of which the Court knew little or nothing, could never acquire authority; and that it was a useless exposure of inevitable and incurable judicial incapacity to publish their judgments. These strictures are to a considerable extent well founded. The surest way to obviate them and others of a like kind, is to constitute the appellate court in manner as indicated; thereby its moral weight shall be decisively greater than the Colonial and other Courts whose decisions it reviews. Apart from this great advantage, there is another which we need hardly elaborate. That is, the very strong bond of union which would be thus formed between the mother country and her colonies. It would be, we conceive, constitutionally impossible, as well as highly undesirable to do away with the right of appeal from the colonies to the Privy Council. Practically but few appeals go there from this Province, so strong, and, in many respects, so well constituted is our own Provincial Court of Appeal. According to statistics laid before the Dominion Parliament, there were, between the years 1869 and 1872, but two appeals from Ontario to the Privy Council. From the other Provinces the figures stood thus: Nova Scotia, one; New Brunswick, two; Quebec, twenty-one. Yet though we of this Province are seldom before the Privy Council, we should not relish being deprived of the right to go there. While our confidence is great in the present constitution of the Judicial Committee, yet a reformation such as has been mooted, and the infusion of a Colonial element into the

appellate system, would afford us the highest satisfaction. In no more grateful way could our Colonial *status* be recognized than in the establishment of one great Imperial Court of pre-eminent jurisdiction and paramount authority, elevation to the bench of which should be the highest goal of colonial forensic ambition.

SELECTIONS.

POWERS OF PROVINCIAL LEGISLATURES

"The British North America Act, 1867," by s. 92, provides that "In each Province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say"—and then enumerates sixteen classes, amongst which are—

"8. Municipal institutions in the Province.

"14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

"15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

"16. Generally all matters of a merely local or private nature in the Province."

By s. 91 it provides that "It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (*notwithstanding anything in this Act*), the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say"—and then enumerates twenty-nine classes of subjects, amongst which is—

"27. The Criminal Law, except the constitution of courts of Criminal Jurisdiction, but including the procedure in criminal matters."

And the section closes in the following words: "And any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

A vast difference between the powers granted to the Federal Parliament and those bestowed on the Provincial Legislatures, is apparent to any one carefully studying the sections in question.

To the Federal Parliament belongs the right of making laws, not only upon all classes of subjects enumerated in s. 91, but also upon all classes of subjects not enumerated in s. 92. To the Provincial Legislatures is allotted the right of making laws in relation to matters coming within the classes of subjects enumerated in s. 92 alone. But that right is further restricted by s. 91, which in effect provides that if there be any clashing, or conflict, between the classes of subjects allotted to the Federal Parliament and those allotted to the Provincial Legislatures, the matter, with respect to which such clashing or conflict arises, shall be deemed to come exclusively within the Jurisdiction of the Federal Parliament.

The authority, then, of the Federal Parliament, so far as the Provincial Legislatures are concerned, is supreme, save with respect to the classes of subjects enumerated in s. 92, over which the Provincial Legislatures have, to a certain extent, exclusive powers to legislate. But when a matter is presented for legislation which falls within a class of subjects enumerated in s. 91, and at the same time comes within a class of subjects enumerated in s. 92, such matter belongs exclusively to the Jurisdiction of the Federal Parliament.

The powers of the Provincial Legislatures are sharply defined by the Act creating the constitutions of the Province.

The powers of the Federal Parliament on the contrary, are general, embracing all subjects save those specially confided to the Provincial Legislatures; so that all powers of Government granted by the B. N. A. Act, 1867, save those exclusively allotted to the Provincial Legislatures, which do not clash with those specially granted by s. 91, vest in the Parliament of Canada.

One of the consequences resulting from the distribution of legislative powers between the Federal Parliament and the Provincial Legislatures is, that all persons occupying judicial positions throughout the Dominion, may, at any moment, in suits or proceedings before them, be obliged to pronounce upon the constitutionality of Federal or Provincial Statutes. In such case the duty of such persons is clear; if a Federal Statute is unconstitutional, to disregard it; and to act in like manner where a Provincial Act is *ultra vires*. A Supreme Court vested with authority to pass in review all Acts whether Federal or Local, and to declare an Act of Parliament or of a Legislature constitutional or unconstitutional, as the case may be, is an absolute necessity of a Federation such as the Dominion of Canada. Its non-creation vests in Justices of the Peace and Commissioners for the trial of small causes, the powers which should alone be vested in such Supreme Court, and confides to the most ignorant, powers which

should be entrusted solely to the most erudite of Judicial officers. If this state of things is allowed to continue, the greatest confusion will prevail, and it is the duty of the imperial Parliament immediately to provide for the constitution, maintenance, and organization of a Court possessing the power of deciding in favour of or against the constitutionality of Acts of Parliament and of Provincial Legislatures.

A constitutional question, fraught with grave consequences to municipal corporations, was lately raised in the Province of Quebec, under the following circumstances:

The Legislature of the Province of Quebec, by 32 Vic. c. 70, s. 17, provided as follows: "In addition to the powers already accorded to the Council of the City of Montreal, in and by its Acts of incorporation, and the several acts of amendment thereof, to enforce the observance of the by-laws of the said Council, made under and by virtue of the Acts for the purposes in the said acts expressed, it shall be lawful for the said Council to impose in and by such by-laws a fine not exceeding twenty dollars and costs of prosecution, to be forthwith leviable on the goods and chattels of the defendant, or to enact that in default of immediate payment of the said fine and costs, the defendant may be imprisoned in the common gaol for a period not exceeding two months, the said imprisonment to cease upon payment of the said fine and costs, or to impose the said fine and costs in addition to the said imprisonment."

Sec. 19 of the same Act provides that "the five preceding sections, and section fourteen and fifteen of the thirty-first Victoria, chapter thirty-seven, shall not be deemed to apply to any matter of criminal procedure before the said Recorder's Court."

Previous to the passing of the 32 Vic. c. 70 (Quebec) the City Council of Montreal had passed a by-law, chap. 17 (Glackmeyer, p. 306), whereof s. 8 was in the following words: "Every description of gaming and all playing of cards, dice, or other games of chance, with betting, and all cock fighting and dog fighting, are hereby prohibited and forbidden in any hotel, restaurant, inn or shop, either licensed or unlicensed, in this said city; and any person found guilty of gaming or playing at cards or any other game of chance, with betting, in any hotel, restaurant, inn or shop, either licensed or unlicensed, in this said City, shall be subject to the penalty hereinafter provided."

S. 9 of the same by-law provided that "any person who shall offend against any of the provisions of this by-law shall, for each offence incur a penalty not exceeding twenty dollars, and be liable to an imprisonment not exceeding thirty days, and a like fine and imprisonment for every forty-eight hours that such person shall continue in violation of this by-law."

So far as the provisions of the said by-law against gaming were concerned, the City Council derived its authority from 23 Vic., c. 72, s. 10, § 1, which provided as follows: "it shall be lawful for the said Council at any meeting or meetings of the said Council composed of not less than two-thirds of the members thereof, to make by-laws which shall be binding on all persons for" (amongst others) "the following purposes . . . to restrain and prohibit all descriptions of gaming in the said city, and all playing of cards, dice, or other games of chance, with or without betting, in any hotel restaurant, tavern, inn or shop, either licensed or unlicensed, in the said city;" and by the 13th section of the last mentioned Act, it was provided: "And by any such by-law, for any of the purposes aforesaid the said Council may impose such fines, not exceeding twenty dollars, or such imprisonment, not exceeding thirty days, or both, as they may deem necessary for enforcing the same."

On the 18th March, 1870, the City Council of Montreal, acting as was supposed under the authority of 32 Vict., c. 70, s. 17, re-enacts all the sections of by-law chap. 17, with the exception of s. 9, in lieu of which it was provided as follows: "Any person offending against any of the provisions of this by-law shall be liable to a fine not exceeding twenty dollars and cost of prosecution, and to an imprisonment not exceeding two months for each offence." (By-law 36, Glackmeyer, App. p. 138.)

Under by-law 36, a person was convicted of playing cards with betting in an hotel in the city of Montreal, and was condemned to pay $20 fine and costs, and to be imprisoned in the common gaol for two months.

The by-law and conviction was referred to solely as illustrations of the working of 32 Vic. c. 30 s. 17, and it is proposed to inquire whether the said section is not *ultra vires* of the Legislature of Quebec.

The arguments made use of in favour of the constitutionality of the section in question are to the following effect:

Under the British North America Act, 1867, s. 92, the Provincial Legislatures have the exclusive right of making laws in relation to matters coming within certain classes of subjects therein enumerated, amongst which classes figure "8. Municipal Institutions in the Province." Consequently the Quebec Legislature had a right to legislate in relation to all matters relating, or essential, to the corporation of Montreal. Having the power to legislate in relation to municipal institutions exclusively, it necessarly follows that the Provincial Legislature have the power of granting to such municipal institutions the right of making by-laws, and as without the power of enforcing obedience to their provisions such by-laws would be but waste paper, it must be taken for granted that the power, formerly exercised

by the Province of Canada, of delegating a right to municipal institutions of passing by-laws and of enforcing obedience to such by-laws, by therein imposing punishment on offenders against their provisions, is under s. 92, § 8, vested in the Provincial Legislature of Quebec. Further that there really is no conflict with the exclusive power possessed by the Federal Parliament over the Criminal Law and Procedure in Criminal matters, as the offence charged, to wit, playing cards with betting, is not an offence under the Criminal Law, but is merely an act prohibited under what may be called police regulations, which form no part or portion of the Criminal Law of the Dominion.

Apparently there is a good deal of force in the line of argument adopted in defence of the section of the statute attacked, but it is not the less true that its validity rests entirely upon the meaning to be attached to, and the extent of the words "The Criminal Law, except the constitution of Courts of Criminal jurisdiction, but including the Procedure in criminal matters," occurring in s. 91, § 27 of The British North American Act, 1867.

It becomes necessary, therefore, in the first place to establish the meaning of the words "The Criminal Law," and "The Procedure in criminal matters."

No difficulty can be experienced in arriving at the conclusion that the Criminal Law is that portion of the law relating to crimes. Consequently the investigation becomes narrowed down into an inquiry as to what is a crime?

It would almost seem as if the Legislature of Quebec were of opinion that the Criminal Law does not apply to any minor non-indictable offence—that in fact all offences punishable solely on summary conviction do not fall within the domain of Criminal Law, and are not recognized as crimes.

According to the definition of Blackstone, "A crime or misdemeanor is an act committed or omitted, in violation of public law. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are merely synonymous terms; though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of misdemeanors only."*

Mr. Sergeant Stephens in his Commentaries gives the following definition: "A crime is the violation of a right, when considered in reference to the evil tendency of such violation as regards the community at large."†

Mr. Justice Littledale in *Mann* v. *Owen*, 9 B. & C. 602, thus expressed himself: "The proper definition of the word 'crime' is an offence for which the law awards punishment."

In the case of *Hearne* v. *Garton*, 2 E. & E. 64, it was held that the provision of the Great Western Railway Act, 5 & 6 W. 4 c. 107, enacting "that every person who shall send or cause to be sent by the said railway any vitriol, or other goods of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package, or give notice in writing to the servant of the Company with whom the same are left, at the time of sending, on pain of forfeiting £10 for every default, or being imprisoned," made such sending of dangerous goods without notice a criminal offence—and Mr. Justice Crompton there said (p. 76): "I do not think that the act is merely for the protection of the railway; it is also for the protection of the public; and it makes the sending a crime, not merely in form, but in reality, by affixing a punishment to it."

In the case of *Attorney General* v. *Radloff*, 10 Ex. 84, which was an information in the Exchequer to recover penalties for smuggling tobacco, the whole question turned upon the point whether such information was a criminal proceeding, and the Court, composed of Pollock, C.B., Parke, Platt and Martin, BB., was equally divided. Pollock, C.B., and Parke, B., being of opinion that it was a criminal proceeding, and Platt and Martin, BB. considering it a civil matter. Parke, B. made use of the following expressions: "Next, is this a criminal proceeding by which the defendant is charged with the commission of an offence punishable by summary conviction? As to its being a criminal proceeding: an information by the Attorney General for an offence against the revenue laws is a criminal proceeding—it is a proceeding instituted by the Crown for the punishment of a crime—for it is a crime and an injury to the public to disobey statute revenue law; and accordingly the old form of proclamation, made before the trial of information for such offences, styles these offences misdemeanors."

Pollock, C.B. said: "In the first place I am of opinion that the proceeding in this Court to recover penalties on an information filed by him on behalf of the Crown, is a criminal proceeding. . . . . The only remaining question then is—is it a criminal offence? I should be sorry if I could bring myself to entertain any doubt about it. I think it is a very grave offence against the public. I cannot distinguish, either in morals or law, between cheating the state and cheating a private individual. . . . . I am of opinion, therefore, that it is a criminal offence. It is very true that it is not punishable in the ordinary way by indictment; but it is punishable by fine, and the fine may be imposed on summary conviction. Therefore, this being, in my judgment, an offence punishable on summary conviction, and the question arising in a criminal proceeding, I am of opinion that the defendant was not a competent witness, and was properly rejected."

* Bl. Com. p. 5, (ed. 1769.)

† Stephen's Com. p. 77.

Platt, B., though of opinion that the proceeding by information in the Exchequer was not a criminal proceeding, put the following question: "What then is a 'civil proceeding' as contradistinguished from a 'criminal proceeding?' It seems to me that the true test is this, if the subject matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding—that is a civil proceeding; but, if the proceeding is one which may affect the defendant at once, by the imprisonment of his body in the event of a verdict of guilty, so that he is liable as a public offender—that I consider a criminal information.

In the case of *Bancroft* v. *Mitchell*, L. 2 R. Q. B. 549, a bankrupt who had obtained an order of protection under s. 112 of 12 & 13 Vict. c. 106, was arrested on a warrant of commitment for not obeying an order made on him under 43 Eliz. c. 2, s. 6, for payment of a weekly sum to the guardians of a union for the support of his mother:—and it was held that the process under which the plaintiff was arrested was of a criminal nature and not for a debt; and that he was, therefore, not protected from arrest under s. 113 of 12 and 13 Vic., c. 106.

Blackburn J. (at p. 555 of the report), said: "The question remains, what is the nature of the process under which the plaintiff was arrested? What is it that the plaintiff has done or omitted to do? He is the son of a woman who is chargeable to the parish, and he is of sufficient ability to support her. By statute 43 Eliz., c. 2, s. 7, it is enacted that the children of every poor person not being able to work, being of sufficient ability, shall, at their own charge, relieve and maintain every such poor person, in that manner and according to that rate, as by the justices shall be assessed, upon pain that every one of them shall forfeit 20s. for every month which they shall fail therein. It was as a *punishment* for the disobedience of an order made under this section that the plaintiff was arrested. . . . The statute makes what was a duty of imperfect obligation a positive duty. . . . . The offence here is that the plaintiff being of ability would not support his impotent relative—that is a duty the neglect of which though only morally wrong before the statute, is made a *crime* by the statute."

In the same case (at p. 556) Mr. Justice Mellor said: "But I have come to the conclusion that the duty of a son to support his mother, having been originally moral only, was made a positive duty by the statute which requires that in the event of the son neglecting that duty, he shall pay such sum as the justices shall order, and then the ultimate enforcement of that duty is carried by fixing a penalty, and in the event of the non-payment of that penalty, a punishment of not more than three months' imprisonment is imposed. That is in the nature of a punishment for a criminal offence."

In *Ex parte Graves in re Prince*, L. R. 3 Ch. Ap. 642, where a debtor was convicted under the 6th section of the Copyright Act (25 & 26 Vic. c. 68), for violations of copyright in engravings, and sentenced to pay a fine *to the proprietor of the copyright*, and in default was imprisoned, and after his conviction executed a deed of composition with his creditors, it was held by the present Lord Chancellor, Lord Hatherley, then Sir W. Page Wood, L.J., and Sir C. J. Selwyn, L.J., that the process under which the debtor was arrested was of a criminal nature, and not for a debt, and that he was not entitled to a discharge. Lord Hatherley (at pp. 644, 645) said: "The case of *Bancroft* v. *Mitchell* has thrown great light on the construction of the provisions of the sections referred to. The *Copyright Act* clearly makes that which the debtor has done an offence against the law. . . . . The scope of the statute throughout is to make the act done an offence; the penalty is to be paid to the person injured, but it is not to be the measure of the damages which he may recover, for he may bring his action and recover damages independently of the penalty. . . . . I think, therefore, that the arguments that the debtor escapes by paying money, and therefore the imprisonment is only a process to enforce a payment of money, is answered by Mr. Justice Blackburn's judgment."

Sir C. J. Selwyn, L.J. (at page 645) said, after referring with approval to Mr. Justice Mellor's opinion in *Bancroft* v. *Mitchell*, "Whether we take the letter or the spirit of the Act, the result is the same. If we look at the letter, the words used are "penalty" and "conviction," all pointing to a criminal offence. If we look to the spirit of the Act, we find certain acts prohibited and treated as offences and certain penalties imposed, and in addition to the penalty, the prosecutor may recover damages by action."

In the 5th edition of Paley's Law and Practice of Summary Convictions, edited by H. T. J. Macnamara, Esq., Recorder of Reading, at pp. 112, 113, the question of what is a "criminal proceeding" is treated in the following manner: "The question, therefore, what is a 'criminal proceeding' as the subject of summary conviction, depends on the manner in which the legislature have treated the cause of complaint, and for this purpose the scope and object of the statute, as well as the language of its particular enactments, should be considered. It may be, as a general rule, that every proceeding before a magistrate, where he has power to convict in contradistinction to his power of making an order, is a criminal proceeding, whether the magistrate be authorized, in the first instance, to direct payment of a sum of money as a penalty, or at once to adjudge the defendant to be imprisoned; and it must be borne in mind that

where a statute orders, enjoins, or prohibits an Act, every disobedience is punishable at common law by indictment; in such cases the addition of a penalty, to be recovered by summary conviction, can hardly prevent the proceeding in respect of the offence from being a criminal one."

T. W. Saunders, Esq., Recorder of Dartmouth, in his work on the Practice of Magistrates' Courts, p. 58, (2nd ed.) thus expresses himself: "Except, therefore, in criminal proceedings, which include an *offence* punishable on summary conviction, the parties and their husbands or wives (as the case may be) are eligible as witnesses on either side, and even in criminal cases the disqualification only applies to the defendant."

J. F. Stephen, Esq., Recorder of Newark on Trent, in his work entitled "A General View of the Criminal law of England," says: "A law is a command enjoining a course of conduct; a command is an intimation from a stronger to a weaker rational being that if the weaker does or forbears to do some specified thing, the stronger will injure or hurt him. A crime is an act of disobedience to a law, forbidden under pain of punishment" (p. 8). "The definition of crimes may therefore be conveniently restricted to acts forbidden by the law under pain of punishment. This definition, however, requires further explanation; for what, it may be asked, is a punishment? Every command involves a sanction, and thus every law forbids every act which it forbids at all, under pain of punishment. This makes it necessary to give a definition of punishments as distinguished from sanctions.

"The sanctions of all laws of every kind will be found to fall under two great heads; those who disobey them may forced to indemnify a third person either by damages or by specific performance, or they may themselves be subjected to some sufferings. In each case the legislator enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It is imposed for public purposes, and has no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public (p. 4). . . . . The result of the cases appears to be that the infliction of punishment in the sense of the word just given is the true test by which criminal are distinguished from civil proceedings, and that the *moral nature* of the act has nothing to do with the question" (p. 5). It is sufficient in this place to observe that they illustrate the general proposition that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but that it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment" (p. 7).

It may, perhaps, be as well here to give an extract from Le Sellyer's *Traite de la Criminalité*, showing what constitutes in France the "crime" of the English Law. "La criminalité c'est la qualité de certains actes les rendant passibles de l'application d'une loi pénale. Ces actes sont compris sous l'expression generale d'*infractions*. . . . Nous donnerons de l'infraction, la définition que donnait du délit le code de brumaire en ajoutant copendant un caractère oublié par ce code, à savoir qu'il n'y a de délit où d'infraction que dans less actes ou omissions *punis* par la loi. . . . Nous dirons donc que l'infraction est toute action toute omission contraire aux lois qui ont pour objet le maintien de l'ordre social et la tranquillité publique et qui est punie par la loi."* (Nos. 2 and 3.)

To define is always difficult, and it is easy to perceive that the answer to the question, what is a crime? is necessarily a definition.

From the foregoing citations, however, it is submitted that the definition of a crime as "an act or omission forbidden by the law under pain of punishment," is strictly correct; but in order thoroughly to understand it, the word "punishment" must also be defined.

The task in this case is hardly less difficult than in that of "crime," but "punishment," it is submitted, may be declared to be "suffering in property or person imposed by the law (in the interests and name of society), on those who violate the law.

The imposition of punishment, then, appears to be the true test by which criminal are distinguished from civil proceedings, and punishment stamps the act or omission, to which it is affixed as a crime.

But it has already been shewn that the Criminal Law is that portion of the law relating to crimes; therefore that portion of the law relating to acts or omissions forbidden under pain of punishment, forms part of the Criminal Law, and all laws regulating proceedings to be adopted to apply such punishments to offenders are laws regulating procedure in criminal matters, and also form part of the Criminal Law.

It is clear, therefore, that by the 32 Vict. c. 70 s. 17, the Legislature of Quebec usurped authority over the Criminal Law (not within the limits granted to them by s. 92 of "The B. N. A. Act, 1867") and its authorization of the Council of the City of Montreal to pass by-laws inflicting punishment on certain offenders against the provisions of those by-laws, was invalid null and of no effect.

Moreover, a Provincial Legislature has but the right of imposing punishment by fine, penalty *or* imprisonment for enforcing any

* See also *Parker* v. *Green*, 2 B. & S. 299; *Cattell* v. *Ireson*, E. B. & E. 91; 2 Austin (ed. 1869) 1101.

law of the Province, made in relation to any matter coming within any of the classes of subjects enumerated in s. 92. It cannot, therefore, impose punishment for any offence which is not an infraction of some of its own laws, made in relation to some matter coming within a class of subjects enumerated in s. 92. It cannot impose punishment by fine *and* imprisonment for the same offence. It cannot regulate the proceedings by which such punishment shall be applied to offenders (otherwise called the Procedure).

The Parliament of the Province of Canada possessed full power over the Criminal Law and had also full power over Municipal Institutions, so that the grant to the Corporation of Montreal of a limited power to award punishment for violation of its By-laws, was strictly within the powers of that Parliament, and such delegation was valid. But how can it be pretended that Provincial Legislatures have the right of delegating to Municipal Institutions greater legislative powers than they possess themselves? How can it be pretended that when Provincial Legislatures have but the right of punishing infractions of *their own laws* by fine, penalty or imprisonment, they have power to vest in municipal institutions the right of punishing infractions of *their* by-laws by fine, penalty *and* imprisonment?

The true rule to follow, it is submitted, with respect to the legislative jurisdiction of Provincial Legislatures, is to confine it strictly to the subjects expressly allotted to them, and in all cases where there is the slightest conflict between the local and federal legislative jurisdiction as to the right to legislate upon any matter, to place it amongst the subjects falling within the powers of the Dominion Parliament.

So far as Procedure in criminal matters is concerned, Provincial Parliaments have no right to legislate, even upon the procedure to be followed in order to secure the punishment of persons guilty of infraction of their own laws. It is perfectly true that Provincial Legislatures have the right of creating certain crimes under s. 92, § 15, by imposing punishment for enforcing observance of their laws; but having so created the crime, their powers with respect to it, save in one particular, appear to end; it then becomes a portion of the Criminal Law, over which the Federal Parliament has jurisdiction, and the Federal law of criminal procedure governs all the proceedings to be taken against the offender, the Provincial Legislature having, however, the exclusive right of repealing the Act by which such crime was created, and thereby removing it from the calendar of crimes.

It may be here remarked that it is exceedingly doubtful if Provincial Legislatures can appoint the mode in which a person accused of a crime created by a local Act can be tried. It would seem as if in the Federal Parliament alone was vested the power of providing that certain offenders should be tried summarily. consequently, as the law of procedure exists at the present moment, all persons charged with offences created by Provincial Legislatures must be tried before a jury. The only mode in which this inconvenience can be remedied is by Act of the Federal Parliament, providing that in all cases, wherein the punishment for an offence imposed by any Act does not exceed a certain sum, or a specified term of imprisonment, the offender shall be tried summarily.

In conclusion, it is submitted that by "The British North America Act, 1867," it was intended to place the Criminal Law and the administration of justice in criminal matters amongst the exclusive powers of the Federal Parliament—that but two exceptions to the general rule therein laid down are made, one by s. 91, sec. 27 and s. 92, sec 14, by which the constitution, maintenance, and organization of Provincial Courts of criminal jurisdiction are placed amongst the exclusive powers of Provincial Legislatures; the other by s. 92, sec. 15, by which in each Province the Legislature may exclusively make laws imposing punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in s. 92.

Evidently the intention of the British Parliament was to provide for the uniformity of the Criminal Law throughout the Dominion—to avoid the inconvenience of having one system of procedure governing Federal crimes, and another system governing Provincial crimes.

The delicious *pot pourri* which might be expected if Provincial Legislatures had unlimited power to meddle with Criminal Procedure is apparent from 34 Vic. c. 2, s. 171 (Quebec), which is in the following words:

"In prosecutions for the sale or barter of intoxicating liquor of any kind, without the license therefor by law required, or, contrary to the true intent and meaning of the law in that behalf, it shall not be necessary that any witness should depose directly to the precise description of the liquor sold or bartered, or the precise consideration therefor, or to the fact of the sale or barter having taken place with his participation, or to his personal and certain knowledge, but the justices trying the same, so soon as it may appear to them that the circumstances in evidence sufficiently establish the infraction of the law complained of, shall put the defendant on his defence, and in default of his rebuttal of such evidence, shall convict him accordingly."

It is to be remembered that penalties to a very large amount may be inflicted under 34 Vic. c. 2, and that in default of immediate payment, it is therein provided that, at the option of the prosecutor, the defendant may be imprisoned for a period of not less than two, and not exceeding six months, so that there can be no doubt that all acts therein prohibited under pain of punishment, are

crimes, created by the legislature of Quebec under and by virtue of s. 92, § 15 of "The British North America Act, 1867." But whence did the Quebec Legislature draw authority to *amend* and alter the law of procedure in criminal matters as is attempted by 34 Vic. c. 2, ss. 148—199?

It is submitted that all the sections of that Act, having reference to procedure are null, void, and of no effect, having been passed in violation of the provisions of "The British North America Act, 1867."—Wm. H. Kerr. —*La Revue Critique.*

COURT OF APPEAL FOR AUSTRALASIA.

The following is the report of the Royal Commissioners of Victoria, concerning the establishment of a Court of Appeal for the Australasian Colonies:

This subject has been frequently mooted. The arguments in its favour are the increased facilities for the hearing of appeals, the promptness of decision, conformity of law, and considerable reduction in the cost of appealing that will be thereby afforded.

A Court of Appeal has become almost a matter of necessity. The number of appeals from the vast dominions of the Crown is greater than it appears the Privy Council is capable of dealing with.

Independent of the difficulty in getting appeals heard by the Privy Council, it is thought that it would be more satisfactory to litigants if their cases were decided by judges who were familiar with the policy of Australian laws. Take, for instance, disputes affecting our pastoral and mining interests, which are based upon laws almost peculiar to Australia. Another difficulty presents itself in the case of appeals in criminal cases. In New South Wales, after a conviction for murder, the prisoner appealed; the conviction was sustained, but after so long a delay between the sentence and the decision of the Privy Council the judgment of the Court could not be carried into effect. In another case that occurred in Victoria, the Privy Council ordered, on a technical point, a new trial; but after so long a lapse of time, the witnesses had disappeared, and the prisoner, although previously found guilty, was allowed to go free.

It has been urged that it is not competent for a colony to establish a Court of Appeal which may exclude the appeal at common law to the Queen in Council, and that the Imperial Government would view any attempt in that direction with great jealousy. That objection can scarcely be urged now so far as it is a question of law, as it has been decided years ago.* An Act was passed by the Imperial Parliament, 28 & 29 Vict., c. 93, s. 5, which enacts "That every colonial Legislature shall have and be deemed to have at all times to have had full power within its jurisdiction to establish Courts of Judicature and to abolish and reconstruct them and to alter the constitution thereof, and to make provisions for the administration of justice therein."

In South Australia a Court of Appeal has been in existence for some years, consisting of the Governor and Executive Council, excluding the Attorney-General. In New Zealand there is also a local Court of Appeal, whose decisions appear to have given satisfaction, for there has been for many years but one appeal to the Privy Council from the Supreme Court of New Zealand. In Canada [alluding to the Province of Ontario] there is a Court of Error, created out of the two Superior Courts, the Queen's Bench and the Common Pleas. [The Commissioners omit the Court of Chancery.] There are, however, occasional appeals to the Privy Council, and it is now proposed to create a Canadian Court of Appeal, and the Governor-General in opening Parliament 1870, made special reference to the proposal in his speech.†

Considerations of grave importance suggest the expediency, if not the necessity, that a Court of Appeal, formed of colonial Judges, should be established for the Australasian colonies. The cost and delay occasioned by appeals to the Privy Council would be removed. Judges conversant with colonial life, manners and laws would adjudicate on matters

* That the right of the King in Council to hear and determine appeals from the colonial Courts on every subject and of every amount in value is one of the most ancient and undoubted prerogatives of the Crown. No prerogative right of His Majesty, much less one that is calculated as this is for the relief and protection of the subject in distant countries, can be abridged or abrogated except by the most direct and express words of an Act of the General Legislature. The King himself cannot derogate from his own right or refuse to exercise his own prerogative for the benefit of the subject. The King has no power to deprive the subject of any of his rights; but the King, acting with the other branches of the Legislature (in this case the Legislature was that of Lower Canada), as one of the branches of the Legislature has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights (*Cuvillier* v. *Alwyn*, 2 Knapp's, Privy Council Case, 70). Where in the East Indies the Supreme Courts had authority to 'allow or deny appeals,' it was decided by the Privy Council that the common law right of appeal had been taken away (*Regina* v. *Alloo Parve*, 3 Moore Jud. App. 488). Lord Brougham said, the Crown may abandon a prerogative, however high and essential to public justice, and valuable to the subject, if it is authorised by statute to abandon it. In *Christian* v. *Cowan*, 1 P. Wms. 329, it is said that, even if there be express words in the charter, excluding the right of the subject to appeal, these words shall not deprive him of his right. 'To this doctrine the Privy Council refused to assent, citing *Ash* v. *Rogle*, 1 Vern. 357; but, for the reason given above, they said, even if it were true, it did not apply to the case before them.'

† In 1834, the Appeal Court of Canada consisted of the Governor or the Chief Justice, with any two or more members of the Executive Council. A similar Court was constituted at Antigua; there, however, the judges may attend and assign reasons, but could not act as members of the Court. The Bahamas had a Court similar to Canada. At Barbadoes the Governor in Council acts; the judges are members of the Court, but no judge is allowed to sit or vote on cases where the appeal is from his own decision. Bermuda has a Court the same as at Barbadoes. In Dominica the Court is constituted as at Antigua, except that the number of the Council is limited to five. At Grenada same as at Dominica, and three members of the Council. In Jamaica the Court is established as a Court of Error, and is similarly constituted as in Canada.—*Clark on Colonial Laws*, passim.

presenting peculiar and distinctive features—the result of colonial habits, industries and trade. The decisions of the various Supreme Courts of the colonies upon purely colonial affairs would thereby be brought into harmony, and uniformity of law be thus encouraged, to the great advantage of commerce. The first effective step towards the union and consolidation of the colonies would thus, it is thought, be consummated.

We recommend that a Court of Appeal for Australasia be formed, consisting of one Judge from each colony, and that the Court should sit in each colony successively, or at such places as may be determined upon as occasion required; and that the quorum be regulated in proportion to the number of colonies that appointed Judges.

On the pronouncing of a judgment by the Court of Appeal similar machinery might be employed in carrying out its decisions as is now used with respect to appeals to the Privy Council.

Opinions vary as to whether the jurisdiction of the Court of Appeal should be modelled upon that of the House of Lords or the Privy Council. The House of Lords is something more than a judicial tribunal, though since 1849 it is the practice to leave the decision of judicial matters exclusively with the "Law Lords." The House of Lords can, however, hear impeachments, and in such cases all the Peers act. That may be said to be the original jurisdiction of the High Court of Parliament, and would not pass if the appellate jurisdiction alone of that tribunal were adopted. On the other hand, the Privy Council does not "hear and determine," it only "hears and reports" to Her Majesty. Bearing in mind the possibility, indeed the probability of a fusion of law with equity by some if not all of these colonies, it is desirable that, in the creation of a Court of Appeal, due provision in that regard should be made, and also that the Court would be empowered to exercise any special jurisdiction any of the colonies may desire to confer upon it.

Another question arises as to how far the Court of Appeal is to be one of final determination, excluding the appeal to Her Majesty in Council. We deem it advisable to leave to the Legislature of each colony to determine that question for itself, by empowering the colonies to enact suitable laws providing the cases in and the terms upon which an appeal may be had to the Queen.—*Law Journal.*

THE TICHBORNE CASE.

This case, which has without doubt occupied a greater amount of public attention than any within memory, has special claims upon our space. We need hardly say that our remarks will be limited to the proceedings which have already taken place. We do not presume to offer any opinion as to what will or may be the ultimate result to the person universally known as the "Claimant," nor is it our intention to comment upon the extraordinary fact that it has taken upwards of one hundred days—many of which were wasted—to decide one of the simplest issues ever submitted to a jury.

Never has there been so severe a strain upon, and test applied to, our judicial machinery, from the police who kept the doors (and who by the way did their extremely difficult task admirably) to the Lord Chief Justice himself; and we cannot say (whatever allowance may fairly be made under the circumstances of the case), that upon the whole the result is, in our judgment, satisfactory.

Of some of the learned gentlemen engaged in the case, little or nothing is known. Whatever is known may readily be said to be to their credit and honour; and of one, probably the youngest man engaged in the case, unhappily nothing more can be known in this life.

Two of the leaders, the Attorney-General (subject, however, to some observation) and Mr. Hawkins, Q.C., have increased their well-earned reputations, in their respective ways. Of Sergeant Balantine it may be said that he opened a hopeless case. Sir George Honeyman and Mr. Giffard have had but little public opportunity to show what men they are, they stand now, in the esteem and respect of their follows as they stood before, as well-instructed, careful and sound lawyers. Mr. Hawkins was so successful in his cross-examination of Baigent, an acute and difficult witness, that our function is a simple one—it is to congratulate him, and pass on.

It is said that the Attorney-General, in the course of this case, lost and regained a reputation — a showy, plausible, and somewhat epigrammatic criticism, which means, if it means anything, that the cross-examination of the Claimant was a failure, that the opening speech for the defence was a success. Every one who attends our Courts must be aware that the efficiency of cross-examination depends to a very great extent upon the manner of the counsel who cross-examines. The late Mr. Edward James was a masterly cross-examiner; his quiet, firm, and determined manner, and powerful presence, had great effect both with the witness and the audience. Mr. Sergeant Ballantine and Mr. Sergeant Parry are both able cross-examiners. The Attorney-General is not: his polished manner and silvery diction, admirable for some purposes, so far from aiding him in this particular province of his calling, tell against him. But, apart from manner, the cross-examination was admirable, laying as it did the foundation of a speech which, for minute industry, mastery of his case, and clear statement, lighted here and there by some passage of pathetic tenderness, was a great forensic achievement.

Whatever force or power of manner was wanting in the cross-examination—however much it may have failed to the view at the moment—its ultimate effect was as fatal as if it

had been enforced and aided by the most scathing and severe manner possible. That wherein Sir John Coleridge failed signally, and wherein Sergeant Ballantine excelled, was temper—that supreme essential to the advocate. There is nothing, perhaps, more exasperating than to find your opponent calm and cool, and oneself drifting into heat and anger. It was the Sergeant's coolness and perfect *sangfroid* that, exciting every now and then a laugh from the audience, aroused the Attorney-General's anger. Hence one or two as unseemly exhibitions as well could be, over which the Chief Justice either did not or could not exercise any control whatever.

Some while ago, the amenities passing between counsel in the Irish Court of Queen's Bench, excited public attention. But the *Irish Law Times* was able to retaliate to some purpose, and characterising the "scenes" in our Common Pleas as almost unprecedented, restored the balance of forensic impropriety to this country.

It has been remarked that whatever may be the practice and position of Mr. Sergeant Ballantine at the Bar, the Sergeant is not a "successful" man. In the attributes which are supposed to be the absolute conditions of forensic success, the Sergeant is wholly wanting. His position and reputation are unique. Possessing no university or scholastic reputation, never having been known as a learned lawyer, without family or social *prestige*, without political or parliamentary influence, and without either eloquence or even any approach to it, he is what he is—one of the most successful advocates—perhaps, in his own way, the most successful advocate in England. After thirty-eight years' practice, the Sergeant cannot attain, nay, cannot even expect, professional promotion, supposing him to care for or desire it. Yet he possesses the gift or gifts that to an advocate stand in lieu and instead of all other, without which all other gifts are vain, and with which all others can be dispensed with. It has been said that "genius is patience." It may be said that the genius of the advocate consists in tact and temper, and these qualifications, at once the substitute and equivalent for many others, the Sergeant possesses.

It is either the fault or the misfortune of Sir William Bovill, that since his elevation to the Bench he has been a party to the most severe conflicts between the Bench and the Bar within our memory. Our readers may remember the *fracas* between the late Mr. Edward James and the Chief Justice, at Manchester; as painful a scene, in our opinion, as ever happened in a court of law.

Since then there have been others, culminating, however, in the scathing criticism of Sergeant Ballantine upon the judge's manner to and cross-examination of a witness, during the progress of this case, which concludes, as we sincerely hope, a series (to use a phrase common in transpontine dramas) of "terrific combats," at once dangerous to the discipline that must be observed at the Bar, and fatal to the dignity and influence of the Bench. But it is with regret that we notice, that while the jury have not only entirely escaped from anything like comment upon the manner in which they have discharged their duty, but, on the contrary, have won golden opinions for their patience, courage and devotion to it, while the Bar has, upon the whole, passed muster with the public critics, the one constituent part of the tribunal upon which ridicule—that most severe of all forms of censure—has been cast, is the judge. The phrase, "Oh, I am so ill," of the judge—whether such were the exact words or not is immaterial—at the time ran a close race in popularity with the "Would you be surprised to hear" of the Attorney-General. It is a little unpleasant to read, among a string of sarcastic eulogies, that the Lord Chief Justice will no longer exhibit "his wonted impartiality," which marked his lordship "as the one judge in England competent to conduct such a case." It has been said that Cervantes laughed away the chivalry of Spain. Men may deserve blame—may be blamed, and be forgiven; but to be ridiculed, and to be ridiculous, is fatal. The severest public censure that a public man can render himself obnoxious to, is the public laughter. It is not by any means pleasant to see, from *Vanity Fair* downwards to the ridiculous ephemeral broad sheets sold in our streets, the Chief Justice in every attitude, and with every atribute, save that of dignity. It may be said that censures of this kind are contemptible; *per se* they might be, but they catch the eye, and are meant both at once to meet and form public opinion. At a time in our history when every institution is on its trial; when the fact that a thing is, has altogether ceased to be any reason for its continuing to be, it would indeed be a day of rebuke and humiliation if anything that the Chief Justice has said or done could impair the dignity of that one institution of the country, the Judicial Bench, in which its people have ever put absolute trust—an institution that has certainly escaped calumny, never (at all events for long years) deserved censure, and has almost escaped criticism.

Last, and not least, "the jury" have won the respect and approbation of their countrymen. They are not responsible for the length of the trial; they stopped it when they could, and it would not have been wise to have stopped it at an earlier stage. But it is with feelings of surprise, nay, of amazement, that we hear that they and the counsel in the case (all, or which, plaintiff or defendant?) have since the termination of their labours dined together—we presume, to celebrate the event! "If London were in ashes," Sydney Smith remarked, "some place would be found among the ruins where the disaster could be celebrated by a banquet." We hardly know whether this latter event is more improbable than the former is undesirable, and we hope to hear the

report contradicted; for we are bound to say, although after such a time both counsel and jury might claim to be old friends, an entertainment given under such circumstances, although lawful, is certainly not expedient.—*Law Magazine.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

Reported by Henry O'Brien, Esq., *Barrister-at-Law.*

Lawrie et al. v. McMahon.

Insolvent Act, 1869, sec. 134.—Appeal.—Death of Insolvent.

When the insolvent who has appealed from the decision of a County Judge refusing to set aside an attachment against him, dies during the pendency of this appeal, and no personal representative has been appointed, the appeal fails.

[Chambers, February 28, 1872. *Galt, J.*]

This was an appeal from the judgment of the County Judge of the County of Lincoln refusing a petition of the defendant to set aside an attachment issued against him as an insolvent.

Since the decision of the learned Judge of the County Court was given, McMahon, the insolvent, died intestate, and no letters of administration had been granted to any person.

Harrison, Q C., contended that under sec. 134 of the Insolvent Act of 1869, this appeal could be prosecuted notwithstanding the death of the petitioner, and though no person had been authorised to administer to his estate.

T. Moss appeared for the creditors, and urged that under the circumstances no further steps could be taken in the matter.

Galt, J.—It is unnecessary to consider the grounds of appeal against the judgment if there is no person authorized to bring them forward. The 134th section, as it appears to me, expressly requires that any persons who wish, on behalf of the insolvent, to interfere in the proceedings in insolvency on behalf of the estate of the debtor must be clothed with authority to act as his legal representative, and as there is no person at present in that position I have no jurisdiction to entertain the matter.

Harper v. Smith.

Change of Venue.

When the place where the cause of action arose and the place of residence of the defendant and of his witnesses concur, a change of venue will be ordered to such county, although the plaintiff's witnesses reside where the venue is laid.

[Chambers, March 19, 1872. *Mr. Dalton.*]

J. K. Kerr obtained a summons calling on the plaintiff to show cause why the venue should not be changed from the County of Haldimand to the County of Wentworth, on the ground that the cause of action arose in the latter county, and that the cause could be more conveniently tried there. The application was made before plea, and after declaration, from which it appeared the action was brought for malicious arrest. In support of the application the defendant's affidavit was filed, showing that the arrest complained of was made at Hamilton, in the County of Wentworth: that the plaintiff had been tried and acquitted there on the charge upon which he was arrested: that nearly all the witnesses to be examined resided in Hamilton: that all the defendant's witnesses resided in that city, there being six in number of whom he then knew, and that the trial of the cause in Haldimand instead of in Wentworth would cause unnecessary expense which would be saved by the proposed change of venue.

F. Osler showed cause, and cited *Diamond* v. *Gray*, 5 Prac. Rep. 33, and *Helliwell* v. *Hobson*, 8 C. B. N. S 761. The defendant must show a preponderance of convenience greatly in his favour, and he has not done so on this application, and unless that be shown, the plaintiff can lay the venue where he likes; and, in addition, it is shown that the defendant cannot have a fair trial at Hamilton, which is another reason why the plaintiff should not be deprived of his right to lay the venue where he chooses. He filed affidavits of the plaintiff to the effect that he lived near Cayuga, in the County of Haldimand: that Wm. Hall, Andrew Street, and other witnesses, all of whom resided near Cayuga, were necessary witnesses on his behalf, all of whom he intended to subpœna: that he had at least four witnesses residing near Cayuga: that a trial at Cayuga, where the assizes last only for a few days, would be less expensive than at Hamilton, where the assizes always last a long time, and where it is more expensive to live and keep witnesses while waiting for the trial than at Cayuga: that the defendant is a grain-buyer, and has many friends at Hamilton, where the plaintiff is a stranger; that there are many grain-buyers who have great influence there, all of whom are making common cause against him, and that he is certain he cannot obtain a fair trial at Hamilton owing to the influence the defendant and his friends can bring there against him.

J. K. Kerr, contra. The venue should be laid where the cause of action arose, and that is the proper place for the trial unless a preponderance of convenience requires the trial to be elsewhere. In this place the balance of convenience concurs with the place of cause of action, and the defendant's residence: *Levy et al* v. *Rice*, L. R. 5 C. P. 119. *Helliwell* v. *Hobson* has been called in question more than once. In *Duris* v. *Hopwood*, 7 C. B. (N. S.) 835, Erle, C. J. said "It is important that a cause should be tried where the cause of action arose, and I think it advisable to act on that principle so far as the interests of justice can be made to coincide with that course." In *Church* v. *Barnett*, L. R. 6 C. P. 117, the Court would not reverse the order of the Master and the Judges who heard the appeal, but Montague Smith, J., said "If the matter had come before me in the first instance, this motion probably would not have been necessary." As to the danger of not getting a fair trial, the defendant has been tried and acquitted at Hamilton on the charge out of which this action arose, and *Roche* v. *Patrick*, 5 Prac. Rep. 210, establishes that this is not material.

Mr. Dalton.—In considering the question as to what is the proper place for the trial of an action, I think much importance should be attached to the place where the cause of action arose. That is the proper place for the trial unless the balance of convenience is against having the trial there. Since the decision in in *Levy et al. v. Rice*, L. R. 5 C. P. 119, referred to in the argument, I think it is settled, as laid down by Bovill, C. J, "that the cause ought to be tried where the contract was made, where the breach took place, and where the defendant resides;" and by Montague Smith, J., "probably the best rule is that when the preponderance of convenience, and the place of contract, and of the defendant's residence concur, these should regulate the Judge's discretion in ordering a change of venue" In the case before me the cause of action, the defendant's residence, and the preponderance of convenience (although not great) all concur, and I therefore think the venue should be changed to Wentworth.

Summons absolute.

ENGLISH REPORTS.

COURT OF EXCHEQUER.

Brown v. The Great Western Railway Co.

Action of tort—Particulars.

In an action to recover damages for injuries sustained by the plaintiff through the negligence of the defendant, the defendant is not entitled to particulars of the injuries on an affidavit merely stating that his defence is embarrassed by the want of such particulars.

Semble, that the defendant would have been entitled to such particulars on an affidavit showing that he had no knowledge of the case the plaintiff intended to set up at the trial, and that the defendant had no means of acquiring such knowledge without the aid of the court.

[Ex. April 20, 1872.—20 W. R., 585.]

The declaration stated that the defendants were carriers of passengers by railway; that the plaintiff became a passenger on the railway for reward to the defendants, to be by them safely and securely carried on a certain journey, but defendants did not safely and securely carry the plaintiff on the said journey, but so negligently managed the railway and the train in which the plaintiff was travelling, that he was bruised, wounded, and suffered severe concussions and contusions, and was and is permanently injured, and was prevented from attending to his business, and incurred loss of time and expense in and about the cure of his said injuries.

The defendants, before pleading, took out a summons for an account in writing of the particulars of the injuries complained of in the declaration. This summons was heard by Master Johnson, who endorsed it, "No order; the defendants, by their medical man, to have liberty to examine the plaintiff." Against this decision the defendants took out an appeal summons, which was dismissed with costs by Mr. Justice Keating, on the broad ground that the plaintiff ought not to be restricted and tied down in the manner he would be if such particulars were ordered and given.

Griffits now moved for a rule in the terms of the original summons at chambers on an affidavit setting out the facts above stated, and that the defendants' medical officer had seen and examined the plaintiff, but no particulars of the plaintiff's injuries had ever been delivered, and that the defendants were embarrassed in the defence of the action for want of such particulars. [Martin, B.—In an action of tort it is not usual to make an order for particulars, unless on affidavit showing that there is special reason why they are required.] The affidavit shows that the defendant's case will be prejudiced for want of these particulars: the Company want to pay money into court. [Kelly, C. B.—The affidavit does not state that the defendants have applied for information without which their legal advisers cannot conduct their case.] I am instructed to move for this rule on the general principle that in such an action as this, the defendants are entitled to particulars of the injuries. [Bramwell, B.—I doubt whether the plaintiff ought not to be tied down to prevent his springing a case on the defendants at the trial.]

The Court refused to rule, intimating that they would have granted it if it had been shown by affidavit that the defendants did not know what case was going to be set up against them, and that they had no means of knowing, except with the aid of the court.

Rule refused.

UNITED STATES REPORTS.

SUPREME COURT OF ILLINOIS.

Ill. Central R. R. Co. v. Jesse L. Abell.

If a railway passenger holding a ticket entitling him to alight at a particular station, is carried past such station without his consent and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages.

Verdict obtained by dividing by twelve.—That while jurors may resort to a process of this sort as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement that each juror should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and place the slip in a hat, that the amounts should be added together and their sum divided by twelve should be the verdict, will vitiate a verdict found under such an agreement.

[C. L. N., June 26, 1872.]

Opinion of the Court by Lawrence, C. J.

If a railway passenger holding a ticket entitling him to alight at a particular station, is carried past such station without his consent, and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages may have accrued to him for non-delivery at the place of his destination,

It is urged that the verdict is not sustained by the evidence, but we refrain from the consideration of that point as there is another upon which the case must be sent to another jury. It appears by the affidavit of the officer having in charge the jury, that, after agreeing to find for the plaintiff, they differed widely as to the damages, and it was then agreed that each juror

should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and place the slip in a hat; that the amounts should then be added together and their sum, divided by twelve, should be the verdict. This was done and a verdict rendered accordingly.

It is true a juror swears that there was considerable consultation after this was done, and that each juror agreed upon the result thus reached as his verdict. He does not however deny that an agreement was made such as is stated in the officer's affidavit, and we cannot doubt it was that agreement which controlled the amount of the damages. The rule upon this matter is well setted. It is, that while jurors may resort to a process of this sort as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement that such a result shall be the verdict, will vitiate a verdict found under and by virtue of such an agreement. *Dunn* v. *Hall*, 8 Blackf, 82; *Dana* v. *Tucker*, 4 J. R., 487; *Harvey* v. *Rickett*, 15 J. R., 87.

This rule is so reasonable as to need no comment. As this verdict was evidently found under the pressure of such an agreement, the judgment must be reversed.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

(*From the American Law Review.*)

FOR NOVEMBER AND DECEMBER, 1871, AND JANUARY, 1872.

(*Continued from p.* 152.)

Devise.

1. Testatrix devised freeholds to trustees in trust for E. for life, remainder to use of first son of E. for life, without impeachment of waste; remainder to use of his first and other sons successively in tail male; like remainders to third and other sons of E. Said sons of E. to have power of jointuring and charging portions. Afterwards a barony was conferred upon E. for life, remainder to E.'s second, third, and other sons in tail male. Proviso, that if such sons, &c., should succeed to the earldom of D., the barony should go to the next son. Testatrix, in a codicil, revoked her will, devising said freeholds to trustees, "to convey, settle, and assure" the same "in a course of entail to correspond as nearly as may be with the limitation of the barony and the provisos affecting the same," and "with all such powers, provisos, declarations, and agreements" as counsel should advise. The House of Lords held on this that said freeholds ought to be limited in strict settlement on the second and younger sons of E. for their respective lives, without impeachment of waste, remainder to the first and other sons in tail male; that there should be such powers of jointuring and charging portions as contained in the will, and that there should be in the settlement a shifting clause in the words of the above proviso: *Held*, that the settlement should not contain a clause postponing raising portions until on or after the decease of the person charging the same; nor a clause avoiding portions and jointures in case the freeholds should shift by the accession of the tenant to the earldom of D.—*Viscount Holmesdale*, v. *West*, L. R. 12 Eq. 280. See L. R. 4 H. L. 543; 5 Am. Law Rev. 304.

2. A. devised a house held under a corporation for the life of K., and twenty-one years after his decease, to trustees in trust to permit her nieces, B. and C., during their joint lives, while single, &c., to reside in said house "during the remainder of the said term for which the said house is held of the corporation aforesaid." After date of the will K. died, and the testatrix surrendered her lease and received a new one for seventy-five years, and after date of the new lease made two codicils to her will: *Held*, that notwithstanding the surrender of the original lease, said trusts were subsisting trusts for at least twenty-one years from the death of K.—*Wedgwood* v. *Denton*, L. R. 12 Eq. 290.

3. Devise "to the use of every son of J. S. now living, or who shall come into existence in my lifetime, and the assigns of such son during his life;" remainder to trustees to preserve contingent remainders, "but to permit such son and his assigns to receive the said rents and profits during his life; and after his decease to the use of such son's first and other sons successively in tail male: *Held*, that the sons of J. S. took as tenants in common, remainder on the death of each son to such son's first and other sons, in tail male, with cross remainders over.—*Surtees* v. *Surtees*, L. R. 12 Eq. 400.

4. A testator devised his real estate upon trust to pay to his daughter an annuity of £6,000 out of the rents, and subject thereto to accumulate for twenty-one years from the testator's death, and to pay off from time to time out of the accumulated fund the incumbrances on said estate. As soon as the incumbrances were paid off, said annuity was to be increased to £8000. He directed his personal estate to be applied in discharging incumbrances when and as should to the trustees seem fit, and any surplus to be accumulated and held on the same trusts as said rents. At the testator's death the personal estate was more than sufficient to

pay off all incumbrances, but the trustees retained enough of such estate to cover the incumbrances and interest thereon, as it was paying a high rate of interest, and they increased the annuity to £8,000: *Held*, that such incumbrances were practically paid off when such personal estate was in the trustees' hands, producing income enough to pay interest upon the incumbrances, and that the annuity was properly increased.—*Astley* v. *Earl of Essex*, L. R. 6 Ch. 898.

5. A testator devised certain estate in trust to pay the income to his two daughters during their respective lives, independently of the control of any husband or husbands with whom either of them might intermarry, and after their respective decease, upon trust to convey the whole equally between the respective husbands of said daughters. If either daughter died unmarried, her share upon the limitations of the other moiety. A daughter married, and her husband died, devising to her his share in said testator's property: *Held*, that the husband had an indefeasible estate of inheritance in said estate, and having devised the same to his wife, she could give a good title to her grantee.—*Radford* v. *Willis*, L. R. 7 Ch. 7.

6. A testator gave certain shares of his real and personal estate to his daughters, making the share of his daughter M. chargeable with a sum advanced, and also directing that if M. should be indebted to either of her brothers or sisters in respect of advances, the trustees under the will were to deduct such debts from M.'s advance, and pay the same to the brother or sister to whom it was owing: *Held*, that the trustees were entitled to deduct such advances without interest, although barred by the statute of limitations.—*Poole* v. *Poole*, L. R. 7 Ch. 17.

7. Devise to trustees "as to" one estate to the use of testator's son R. for life, and to R.'s sons in tail male and tail general; and in default of such issue, to testator's son J. for life, and to his sons in tail male and tail general; and in default of such issue male, to R.'s daughters in tail male; and in default of such issue female, to J.'s daughters in tail male "As to" a second estate, in similar terms to J., after which the will proceeded, "and in default of such issue male and female of all the sons and daughters of his sons R. and J.," then over. *Held*, that the devise over was ambiguous, but under all the circumstances of the case referred to both estates, and not the latter only.—*Gordon* v. *Gordon*, L. R. 5 H. L. 254.

See Bequest; Condition; Executors and Administrators, 1; Joint Tenancy; Mortmain; Partnership; Power; Reversionary Interest; Security, 2; Tenant for Life.

Director.—*See* Company, 3; Ultra Vires.

Distribution.—*See* Bequest, 2.

Divorce.

The court decreed nullity of marriage where the parties had been married two years and nine months, where there had been no consummation, and the same was practically impossible, as the wife, who was suffering from excessive sensibility, refused to submit to the remedies proposed by physicians, and denied her husband all access, though she had no structural defect. *G*—— v. *G*——, L. R. 2 P. & D. 287.

Domicile.

1. A French subject took up his sole place of abode and business in England, where he lived thirty years, making occasional visits to France. He married and intended to end his days there, but refused to be naturalized, as he was a Frenchman, and might return to reside in France. *Held*, that his domicile was English.—*Brunel* v. *Brunel*, L. R. 12 Eq. 298.

2. To effect a change of domicile it is sufficient that there is intention of settling in the new locality, and of making a principal or sole and permanent home there, and no intention to change civil *status* is necessary.—*Douglas* v. *Douglas*, L. R. 12 Eq. 617.

See Will, 1.

Easement.

Under 2 and 3 Will. 4, c. 71, a landlord gains no easement or right whatever until twenty years of adverse possession have elapsed. Therefore a tenant of a house which has enjoyed access of light and air over adjoining land, for fourteen years, may take such land, and thereby uniting possession, prevent his landlord gaining an easement. A tenant in possession may refuse to allow his landlord to arrest the growing right of a neighbor to an easement. If enjoyment of light and air continue as above for fourteen years, and then is suspended by unity of possession of the dominant and servient estates, and after such unity is severed the enjoyment is continued six years more, an easement is gained.—*Ladyman* v. *Grave*, L. R. 6 Ch. 763,

See Ancient Light; Reservation; Way.

Eels.—*See* Fish.

Encroachment.—*See* Landlord and Tenant.

Entry.—*See* Mortgage, 2.

Equitable Mortgage.—*See* Mortgage, 3.

Equity.

1. The manager of a society, by permission of its directors, deposited money with the de-

fendant. The latter drew a check for the same, and gave it to the manager, who never paid it to the society, and shortly afterward died. The trustees of the society brought a bill against the defendant for repayment, on the ground that such deposit was illegal, and the plaintiff had notice thereof, and that the repayment to the manager was without authority of the directors: *Held*, that if there had been a breach of trust, the directors had been parties to it, and being the real plaintiffs, could not compel repayment to the trustees, who were only formal parties to the suit. Also, that the bill not being framed on the ground of a breach of trust, was a mere money demand, and did not authorize proceedings in equity. *Hardy* v. *Metropolitan Land and Finance Co.*, L. R. 12 Eq. 386.

2. Notes were discounted at an exorbitant rate for a young man, who gave security for the notes. The court ordered the security to stand for the sums actually advanced, with interest, though there was no fraud in the case. —*Tyler* v. *Yates*, L. R. 6 Ch. 665; s. c. L. R. 11 Eq. 265; 5 Am. Law Rev. 657.

See Bequest, 1; Husband and Wife; Specific Performance, 1.

Equity of Redemption.

A woman was entitled to a rent charge in the event of her surviving her husband. She became a party to, and executed and acknowledged a mortgage of the estate, subject to the charge, the deed declaring that she joined "for the purpose of absolutely releasing, and forever extinguishing," the rent charge; and by the proviso for redemption, the estate (conveyed to the mortgagee, subject to certain prior charges) was to be reconveyed to the husband "subject as aforesaid." The estate was reconveyed to the husband: *Held*, that "it was no unreasonable view" that the wife's release of her rent charge was subject to equity of redemption, and that the title was too doubtful to be forced upon a purchaser.—*In re Betton's Trust Estates*, L. R. 12 Eq. 553.

Equity Pleading and Practice.

1. A bill by a lessee against his lessor for specific performance, and for an injunction restraining a previous lessee from obstructing the rights claimed by the complainant, is multifarious; but such objection must be taken by way of demurrer, and not at the hearing.—*Cousens* v. *Rose*, L. R. 12 Eq. 366.

2. Three out of four residuary legatees filed a bill against the testator's widow and former partner, who were executrix and executor respectively, praying for accounts of what said partner had, or might, but for wilful neglect, have received from testator's estate; that he might be charged with what was due both before and since the testator's death, in respect of said partnership; and for a receiver of the assets of the partnership; and for an injunction restraining said partner and executor from interfering with the testator's estate and the assets of the partnership: *Held*, that the bill was not demurrable for omission of the fourth residuary legatee, nor for multifariousness, *i.e.*, misjoinder of subjects of suit.—*Pointon* v. *Pointon*, L. R. 12 Eq. 547.

Estate for Life.—*See* Devise, 4.

Estate Tail.—*See* Devise, 1, 3, 7.

Evidence.

A testator appointed his son, Forster Charter, as his executor. He had two sons, William Forster Charter and Charles Charter: *Held*, that inasmuch as if a man has several Christian names they are together but one name, the testator had not sufficiently described either of his sons, and evidence showing the testator intended to appoint his son Charles was admissible.—*Charter* v. *Charter*, L. R. 2 P. & D. 315.

See Negligence, 1; Pleading.

Execution.—*See* Tort.

Executors and Administrators.

1. A testator devised to a creditor his real and personal estate in trust for payment of his debts, and made the creditor his executor: *Held*, that the fact that the trustee was executor, gave him no right to retain his whole debt from the trust fund in preference to other debts. —*Bain* v. *Sadler*, L. R. 12 Eq. 570.

2. A testator appointed his wife executrix "and in default of her" two other persons to be executors. Probate was granted to the wife, who died, leaving the estate partly unadministered: *Held*, that probate should be granted to the said two persons as substituted executors.—*In the goods of Foster*, L. R. 2 P. & D. 304.

See Bequest, 1, 3; Equity Pleading and Practice, 2; Evidence.

Fish.

Eels are river fish.—*Woodhouse* v. *Etheridge*, L. R. 6 C. P. 570.

Foreign Enlistment Act.—*See* Prize.

Foreclosure.—*See* Mortgage, 2.

Forfeiture.—*See* Damages, 1; Piracy.

Fraud.—*See* Mortgage, 3; Trust, 2.

Frauds, Statute of.

A. entered into a contract with B. for the purchase of wool, and signed and handed to B. a memorandum of the terms of sale. B. subsequently wrote to A., "It is now twenty-eight

days since you and I had a deal for my wool. . . . I shall consider the deal off as you have not completed your part of the contract. yours, B." And on A. asking for a copy of said memorandum, B. wrote, "I beg to enclose a copy of your letter," enclosing a copy of the memorandum. *Held*, that there was sufficient memorandum of the contract signed by B. to satisfy the statute of frauds.—*Buxton* v. *Rust*, L. R. 7 Ex. 1.

See Broker, 2; Landlord and Tenant.

Fraudulent Preference.—*See* Bankruptcy, 3; Surety.

Freehold.—*See* Common.

Freight.—*See* War.

Grant.—*See* Reservation.

Guarantee.—*See* Bankruptcy, 1.

Guardian.—*See* Illegitimate Children.

Husband and Wife.

A wife has no equity to a settlement out of arrears of past income of her leasehold property, which have been duly received by her husband, but retained and accumulated for a particular assignee of the same.—*In re Carr's Trusts*, L. R. 12 Eq. 609.

See Divorce; Equity of Redemption.

Illegitimate Children.

A testator cannot by his will appoint a guardian for his illegitimate children.—*Sleeman* v. *Wilson*, L. R. 13 Eq. 36.

Improvement.—*See* Tenant for Life.

Incumbrance.—*See* Devise, 4.

Infant.

A mother maintained her son before, and for six years after, his majority, but with no intention of making a claim for maintenance. *Held*, that she had no claim for maintaining her son during minority, and that to claim the same for the period since majority, she must show a contract.—*In re Cottrell's Estate*, L. R. 12 Eq. 566.

See Collision; Sale.

Injunction.—*See* Ancient Light.

Injury.—*See* Damages, 2.

Insurance.

1. *The Charlemagne* was insured to Calcutta, and thirty days after arrival, on a valued policy, and at and from Calcutta by the same underwriters on a second valued policy. The vessel was damaged before arrival, was partially repaired before the expiration of thirty days, and thereafter, and when the second policy had attached, was totally destroyed by fire. *Held*, that the owners were entitled to recover under the first policy such sum as said repairs would have cost if they had been completed; and under the second policy the whole amount of the valuation therein.—*Lidgett* v. *Secretan*, L. R. 6 C. P. 616.

2. The defendant was insured on merchandise, "the assured's own, in trust, or on commission, for which he is responsible." He bought tea in warehouse, and sold it while there, and was paid, but had not indorsed over the warrant for delivery, when the tea was destroyed by fire. *Held*, that the property in the tea having passed to the purchaser, the tea was not covered by the policy.—*North British Insurance Co.* v. *Moffatt*, L. R. 7 C. P. 25.

3. In accordance with the rules of Lloyd's the ship *Annie* was classed in 1865 as A 1 for seven years. In order to retain this position a vessel must undergo a half-time survey; if the result is satisfactory, the letters "H. T." are placed opposite her name in Lloyd's book, but the time for such half-time survey is not in all cases strictly observed. Copies of the books in the hands of subscribers are corrected weekly. In October, 1869, the owner of said vessel was notified that it was time for the half-time survey, and he replied that he had decided not to continue his vessel in Lloyd's book. The owner applied for insurance in the above month to the defendant, who, having a copy of Lloyd's book, in which said *Annie* stood A 1 for seven years from 1865, asked if the *Annie* therein mentioned was his vessel, and was told it was. Said vessel was initialed for insurance November 15, and a policy made out December 1, 1869; she was struck from Lloyd's book November 16, and the plaintiff was notified thereof November 17, and the vessel was lost December 31. It was left to the jury to determine among other things whether the plaintiff's resolve not to continue his vessel on Lloyd's and his reply to that effect, was a material fact, and the jury found in the negative. *Held*, (by Mellor, Lush, and Hannen, JJ.), that the case was properly left with the jury. By Cockburn, C. J., dissenting, that though the case was properly not withdrawn from the jury, the facts showed a material concealment, and that the case should be sent down for a new trial.—*Gandy* v. *Adelaide Insurance Co.*, L. R. 6 Q. B. 746.

Joint Tenancy.

A gift to "all and every her child and children, and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit," *held* to create a joint tenancy.—*Morgan* v. *Britten*, L. R. 13 Eq. 28.

See Adverse Possession; Bequest, 6, 11; Devise, 3; Trust, 1.

Judgment.—*See* Tort; Trover.

Jurisdiction.—*See* Sale.

Landlord and Tenant.

A lessee enclosed with consent of the lessor a piece of land adjoining the premises already demised, and held the whole some thirty years. It was contended that there was a parol demise of said adjoining piece of land, which created a tenancy at will, which expired by 3 & 4 Wm. 4, c. 27, § 7, on one year from such demise, and that after the expiration of this year, the statute of limitations began to run, whereby the lessee in this case had acquired title. *Held*, that the ordinary rule that an encroachment by a tenant must be taken to be for the benefit of the lessor, and treated as part of the demised premises, applied, and that the lessee had acquired no title.—*Whitmore* v. *Humphries*, L. R. 7 C. P. 1.

See Common; Devise, 2; Easement; Limitations, Statute of, 2; Way, 1.

Lease.—*See* Devise, 2; Equity Pleading and Practice, 1; Way, 1.

Legacy.—*See* Bequest; Condition; Devise; Executors and Administrators, 1; Joint Tenancy; Mortmain; Partnership; Reversionary Interest; Set-off; Tenant for Life.

Lex Loci.—*See* Will, 1.

Libel.

The plaintiff was a manufacturer of a bag he called the "Bag of Bags." The defendant published the following concerning said bag: "As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the public *ad nauseam*." *Held* (Lush, J., dissenting), that a question was presented for the jury as to whether the above words were intended to disparage the plaintiff in the conduct of his business. Demurrer to delaration on said words overruled.—*Jenner* v. *A'Beckett*, L. R. 7 Q. B., 11.

Lien.

1. By articles of association a bank was to have a lien on shares for money due from the shareholder. The bank was wound up, and its property sold to a second bank. Shareholders not subscribing to the second bank were paid £2 per share. *Held*, that the bank's lien extended to such sum, as representing a share.—*In re General Exchange Bank*, L. R. 6 Ch. 818.

2. Goods were carried by railway for a company on a credit account, a condition being that the railway was to have a general lien on such goods for all moneys due. Coke was put in trucks belonging to the company on the railway line, and there detained by the latter. *Held*, that a lien being a right to hold goods that had been carried in respect of such carriage, or, if so agreed, in respect of debts of the same character contracted in respect of other goods, to stop said coke before it had been carried, and hold the same for a debt, was contrary to the nature of a lien.—*Wiltshire Iron Co.* v. *Great Western Railway Co.*, L. R. 6 Q. B. (Ex. Ch.) 776; s. c. *ib.* 101.

See Charter-Party, 1.

Limitations, Statute of.

1. A. agreed to build ships for the plaintiff and deliver at a specified time. For delays beyond that time, certain sums were to be paid by A. as liquidated damages, and to be deducted from the purchase-money. All disputes were to be referred to arbitration. The ships were not built at the specified time, and a dispute arose; a draft reference was prepared, and an arbitrator named by the plaintiff only. The plaintiff subsequently wrote a letter to A., stating that he had named an arbitrator, and ending: "The final arrangements for the reference therefore rest, and have long rested with you." Again the plaintiff wrote, stating that he had received a paper, purporting to be a memorandum of an account between himself and A., which was altogether incorrect, both in principle and in detail, omitting all deductions and credits to which he was entitled, which latter would leave the balance considerably in his favour; but that he was willing to have all accounts and questions settled by arbitration, and that he again called on A. to concur. The letter to be "wholly without prejudice." *Held*, that the above letters contained no unconditional admission of a debt, or promise to pay whatever might be found to be due upon arbitration, and did not take A.'s claim out of the statute of limitations. And further, that the words "without prejudice" would prevent the second letter having such effect.—*In re River Steamer Co.*, L. R. 6 Ch. 822.

2. The owner of an estate subject to a tenancy at will has by statute a right of entry at the end of a year from the commencement of the tenancy. Where a tenant at will had held the premises for twenty-two years, it was *held*, that at the expiration of twenty one years from the commencement of the tenancy, the twenty years prescribed by statute had run, and the tenant had gained title; and that whether dur-

ing said period there had been acts sufficient to determine said tenancy, was immaterial, as no new tenancy had been created.—*Day* v. *Day*, L. R. 3 P. C. 751.

See Adverse Possession; Devise, 6; Easement; Landlord and Tenant.

Luggage.—*See* Salvage, 2.

Maintenance.—*See* Settlement, 2.

Marriage Settlement.—*See* Settlement.

Married Woman.—*See* Equity of Redemption; Husband and Wife; Infant.

Marshalling Assets.—*See* Security, 2.

Misjoinder.—*See* Common; Equity Pleading and Practice.

Mortgage.

1. The court ordered specific performance o an agreement to execute a mortgage containing an absolute power of sale.—*Ashton* v. *Corrigan* L. R. 13 Eq. 76.

2. If a mortgagee enters at a time when he is entitled to an order to foreclose, and receives the rents and profits, he opens the foreclosure by such receipt.—*Prees* v. *Coke*, L. R. 6 Ch. 645.

3. The plaintiff received deeds by way of equitable mortgage, and subsequently the mortgagor executed a legal mortgage. The solicitor of the legal mortgagee omitted examining a parcel given him purporting to contain all the title-deeds, but from which the plaintiff's said deeds were wanting. *Held*, that there was not such a case of wrongful negligence as to postpone in equity the legal to the equitable mortgage.—*Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652.

4. A solicitor induced a client to advance money upon mortgage, and subsequently advised a second client to do the same, without informing him of the first mortgage. The second mortgage was registered first. *Held*, that the second mortgagee must be taken to have had notice of the first mortgage through his solicitor, and had not gained priority.—*Rolland* v. *Hart*, L. R. 6 Ch. 678.

See Equity of Redemption; Security, 2.

Mortmain.

A testator bequeathed money towards expenses of building a church at Z., but if not begun in testator's lifetime, or within two years of his death, the legacy not to be payable. *Held*, that to make such a gift valid, the site on which the building is to be erected must be referred to, and the application of the money to the purchase of land must be expressly excluded, and said legacy was held void.—*Pratt* v. *Harvey*, L. R. 12 Eq. 544.

See Charitable Institution.

Multifariousness.—*See* Equity Pleading and Practice.

Naturalization.—*See* Domicile, 1.

Negligence.

1. The defendants owned a railway bridge over a highway, supported by an iron girder resting upon brick piers, from which a brick fell on the plaintiff, shortly after the passage of a train. The bridge had been used three years at the time of the accident. *Held*, that the defendants were bound to use due care in providing for the safety of the public, and that the question of negligence was rightly left with the jury.—*Kearney* v. *London and Brighton Railway Co.*, L. R. 6 Q. B. (Ex. Ch.) 759; s. c. L. R. 5 Q. B. 511; 5 Am. Law Rev. 298.

2. Declaration that the defendant was possessed of yew-trees, the clippings of which he knew to be poisonous, whereby it became the duty of the defendant to prevent the clippings being placed on others' land, yet the defendant took so little care of the clippings that they were placed on land not the defendant's, where the plaintiff's horses lawfully being, eat of the same and were poisoned. *Held*, on demurrer, that the facts alleged did not cast the alleged duty on the defendant.—*Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

See Collision; Mortgage, 3.

Nonjoinder.—*See* Common, 2.

Notice.—*See* Mortgage, 4.

Parties.—*See* Bequest, 1; Common; Equity, 1; Equity Pleading and Practice.

Partnership.

By articles of partnership, profits were to be divided annually. Subsequently the partners resolved to make up the accounts half-yearly in March and September, but they held meetings very irregularly, in which they disposed of profits by resolution, until which resolution no profits were carried to the credit of either partner. A partner directed in his will that from the day of his decease the annual income of his personal estate should belong to B., and that for this purpose the net profits of the partnership should be deemed annual income. The testator died in August, 1869. At a meeting of the testator's executor and the surviving partner, it was resolved that the profits of the year ending March, 1869, be divided, and they were carried to the credit of the testator's account under date of September, 1869, and in December they were paid to his executor. In March, 1870, it was resolved to divide the profits of the half-year ending September, 1869, and the same were paid to the executor. *Held*, that the profits of the year ending March, 1869, were capital, and formed part of the testator's estate; but that the profits of the half-year,

ending September, 1869, were income only and went to B.—*Browne* v. *Collins*, L. R. 12 Eq. 586.

See Bequest, 13; Equity Pleading and Practice.

Patent.

1. A patentee described his invention and the machinery by which it was to be made, and then claimed the production of said invention by machinery. *Held*, that the claim was not *per se* too large.—*Arnold* v. *Bradbury*, L. R. 6 Ch. 706.

2. A patent for the combination of several separate and distinct matters is valid, though each of such separate matters is previously known.—*Cannington* v. *Nuttall*, L. R. 5 H. L. 205.

Penalty.—*See* Damages, 1.

Performance.—*See* Specific Performance.

Perpetuity.—*See* Charitable Institution.

Personal Estate.—*See* Sale; Settlement, 1.

Piracy.

A ship belonging to a pirate and sold to a *bona fide* purchaser for value is not subject to forfeiture to the crown on proceedings instituted after the sale.—*Regina* v. *McCleverty* (*The Telegrafo*), L. R. 3 P. C. 673.

Pleading.

In answer to a petition against a ship and her owners, the appellants denied the statements therein, and pleaded and proved that the damage complained of had been the subject of an action in a court of law in which judgment had been recovered and satisfied. It was also proved that the damage was done by one having charge of the vessel as consignee for sale, and not as agent for the owners. *Held*, that the defendants' general denial justified the admission of said latter evidence; also, that the defendant was entitled to have a decision on the defence specially pleaded, so that, if prejudiced, he might appeal. Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may if he does not get thereby fully satisfied, resort to the other.—*Yeo* v. *Tatem* (*The Orient*), L. R. 3 P. C. 696.

Possession.—*See* Easement.

Power.

K. had power to charge real estate for children as follows: if there should be one or two children, for £3000; if three children, for £4000; if four or more children, for £5000 "said sums to vest in and be paid to the child or children respectively for whom the same respectively shall be charged, or to or among him, her, or them, and his, her, or their respective issue at such age or time" as K. should appoint. K. had five children, one of whom died an infant, and another leaving two children. After said deaths, K. appointed £2500 to one child, £2000 to another, and £500 to said two children. *Held*, that the whole £5000 had become appointable.—*Knapp* v. *Knapp*, L. R. 12 Eq. 238.

2. By marriage settlement a husband had power "as to so much of said hereditaments and premises as shall not exceed the annual income of £300" to the use of children of the marriage. By will the husband devised "the whole of my property, real and personal, consisting of a farm," being said hereditaments, "and whatever may devolve on me by virtue of said marriage settlement," in trust for said children in certain proportions. He also gave his trustee power "to divide the income of my entire property according to the provisions before made, or to sell the whole and divide the proceeds among my children." *Held*, that the will did not operate as an exercise of said power.—*Wildbore* v. *Gregory*, L. R. 12 Eq. 482.

See Devise, 1, 3; Mortgage, 1.

Prescription.—*See* Easement.

Principal and Agent.—*See* Broker; Charter-Party, 1; Railway.

Priority.—*See* Mortgage, 3, 4.

Prize.

The Foreign Enlistment Act enacts that if any person despatches a ship with intent, or having reasonable cause to believe, that the same will be employed in the naval service of any foreign state at war with any state friendly to Great Britain, such ship shall be forfeited. A French cruiser captured a German vessel, in the late war between the two countries, and placed a prize crew on board, who took the vessel to a port in England. There a British tug agreed to tow the prize to Dunkirk Roads. *Held*, that as a *deductio infra præsidia* was not necessary by the law of England or France to complete the capture, the tug was not an agent in effecting such capture; and that the presence of a prize crew and officer on board the prize did not constitute her a vessel of war, whereby to tow her would be to be employed in the service of a belligerent.—*The Gauntlet*, L. R. 3 Ad. & Ec. 381.

Probate.—*See* Executors and Administrators.

Promissory Note.—*See* Bills and Notes.

Proof.

Bills drawn by the A. bank upon the B. bank were accepted for the accommodation of the A. bank, upon the understanding that funds would be furnished to meet them. The bills

were discounted by C., but before they matured both said banks suspended payment. C. proved against both banks and recovered a dividend from both. *Held* that the B. bank might prove against the A. bank for the amount it had paid to C.—*In re Oriental Commercial Bank*, L. R. 12 Eq. 501.

See Bankruptcy, 2.

Proximate Cause.—*See* Collision.

Railway.

By 17 & 18 Vict., c. 31, no railway company shall give any undue or unreasonable preference or advantage to any person or company, nor subject any company or person to any undue or unreasonable prejudice or disadvantage. The plaintiff had a general authority from certain traders to receive all goods consigned to them, and arriving at a certain station on a railway. The railway refused to deliver goods to the plaintiff without a special order describing the goods in each case, though no such order was required of an agent of their own who was employed at the station to receive and distribute goods. *Held*, that the railway had subjected the plaintiff to undue disadvantage.—*Parkinson* v. *Great Western Railway Co.*, L. R. 6 C. P. 554.

See Lien; Negligence, 1; Specific Performance, 1.

Real Estate.—*See* Settlement, 1; Statute.

Release.—*See* Surety, 1.

Religious Institution.—*See* Charitable Institution.

Remainder.—*See* Bequest, 4, 6; Devise, 1–3; Reversionary Interest; Trust, 1.

Remainder-man.—*See* Tenant for Life.

Rents and Profits.—*See* Mortgage, 2.

Repairs.—*See* Tenant for Life.

Reservation.

The appellant granted land to G., "reserving, all and sundry, the coal and limestone within the bounds of the land specified, so as it shall be lawful for the said Duke to set down coal-pits, &c., and win coal and limestone within the bounds of the said lands; and to make all engines and easements necessary for carrying on the said coal and limestone work, and free entry thereto for making sale thereof and taking the same." *Held* (Lord Chelmsford, dissenting), that the appellant had by the reservation the absolute property in said coal and limestone, and might make a tunnel through them for the passage of other coal belonging to him in land adjacent.—*Duke of Hamilton* v. *Graham*, L. R. 2 H. L. Sc. 166.

Residence.—*See* Domicile.

Residuary Estate.—*See* Bequest, 2, 4, 10.

Residuary Legatee.—*See* Equity Pleading and Practice; Set-off.

Reversion.

A testator devised certain estates on trust to pay the income to his daughter, until she being discovert, should do any thing whereby said income should be aliened, or become receivable otherwise than by herself personally, in which event the income to be upon such trust for said daughter or her child, children, or remoter issue, as the trustees should think proper. An event happening as above described, it was *held* that the possibility that the trustees would appropriate some part of the said income to the daughter did not vest in her a reversionary interest contingent upon the discretion of the trustees.—*Milne* v. *Milne*, L. R. 2 P. & D. 295.

See Sale.

Sale.

Reversionary personal estate to which an infant was entitled was sold by order of court, a condition of sale being that the purchaser should not dispute the jurisdiction of the court to order such sale. *Held*, that the condition was proper and reasonable. It appears that as the purchaser knew the facts in the case, he could not have disputed the jurisdiction, had such condition been omitted.—*Nunn* v. *Hancock*, L. R. 6 Ch. 850.

See Bequest, 3; Frauds, Statute of; Insurance, 2; Mortgage, 1; Piracy; Settlement, 1; Warranty.

Salvage.

1. A propeller fell in with a steamer in distress, and agreed to tow her to Lisbon for a certain sum, the weather at the time being rough and threatening. After the towing had been undertaken the wind and sea became much heavier, and the hawsers connecting the vessels were several times parted. Finally the steamer was anchored, and her crew taken for the night into the propeller. The master of the propeller then informed the master of the steamer that he considered the contract to tow for said sum to be at an end, and the master of the steamer acquiesced. Next day, with much difficulty and danger, the steamer was towed by the propeller into Lisbon. The owners of the steamer paid the said contract price into court, with an additional sum to pay for quarantine expenses and demurrage incurred by the propeller in consequence of her putting into Lisbon. *Held*, that no such circumstances as to vacate the contract intervened; that there was no voluntary abandonment of said contract; that tendering said additional sum was not an admission that said contract was

not binding, and that therefore the propeller could claim no more than agreed to in the contract.—*The Waverley*, L. R. 3 Ad. & Ec. 369.

2. The wearing apparel of passengers, and other effects carried by them for their daily personal use, are not liable to contribute to salvage.—*The Willem III.*, L. R. 3 Ad. & Ec. 487.

3. The master and crew of a vessel are entitled to compensation for salvage services to another vessel, although both vessels belong to the same owners.—*The Sappho*, L. R. 3 P. C. 690.

Security.

1. The trustees of a society, having no power to borrow, borrowed a certain sum of W., giving him a note therefor, and depositing certain deeds with W. as security. *Held*, that whether W. could enforce his claim or not, the trustees were not entitled to recover the deeds without payment of the money advanced.—*Wilson's Case*, L. R. 12 Eq. 521.

2. A testator having devised estates to A. and B., deposited the title-deeds of the estate devised to A. with a bank as security against the general balance of his account. Afterward he deposited the title-deeds of the estate devised to B. as security for further small advances, and subsequently died: *Held*, that A.'s estate was liable for the amounts due up to the second deposit of title-deeds, and that the estates of both A. and B. were chargeable proportionately with the debt subsequently incurred.—*De Rochefort* v. *Dawes*, L. R. 12 Eq. 540.

See Bankruptcy, 2; Equity, 2.

Set-off.

B. had an account with a bank, upon which he overdrew £300. He also had a second account with the bank, headed executor's account, under which stood a large sum to his credit as executor of A. B. was A.'s residuary legatee, and there was a surplus of £1900 after providing for all legacies. *Held*, that the bank could set off the sum due from B. on his private account against the amount due him on the executor's account.—*Bailey* v. *Finch*, L. R. 7 Q. B. 34.

Settlement.

1. By marriage settlement real estate was conveyed to trusts for the children of the intended marriage in equal shares and proportions, as tenants in common, and their heirs and assigns respectively, with a power of sale, provided the purchase-money should be paid to the trustees to be laid out in the purchase of other lands and premises, or in government or real securities, to enure to the same trusts as declared concerning the real estate. The premises were sold under the power. *Held*, that the proceeds must be treated as personalty.—*Atwell* v. *Atwell*, L. R. 13 Eq. 23.

2. A father gave a fund to trustees, with directions that they should apply such part of the income as they should think fit for the education of his children; but thereafter he supported and educated them himself, without calling on the trustees. *Held*, that the father was not entitled to be repaid such sums as the trustees might have expended in educating the children. *In re Kerrison's Trusts*, L. N. 12 Eq. 422.

See Bequest, 8; Company, 5: Devise, 1; Husband and Wife; Power, 2.

Shareholder.—*See* Company; Lien.

Ship.—*See* Charter-party, 1–3; Collision; Damages, 2; Insurance, 1, 3; Piracy; Pleading; Prize; Salvage; War.

Solicitor.—*See* Mortgage, 4: Trust, 2.

Specification.—*See* Patent.

Specific Performance.

1. A railway company agreed to construct a side railway upon the plaintiff's land, and subsequently refused to perform its contract. *Held*, that a railway would be dealt with by a court of equity upon the same principles as individuals; and that the fact that the plaintiff might recover damages for the breach of contract was no defence to a decree for specific performance, which was ordered.—*Green* v. *West Cheshire Railway Co.*, L. R. 13 Eq. 44.

2. The owners of a colliery entered into a contract for the purchase of an adjoining field without informing its owner that they had taken a large quantity of coal from under the field. *Held*, that specific performance of the contract must be refused.—*Phillips* v. *Homfray*, L. R. 6 Ch. 771.

See Company, 1.

Statute.

By statute the "owners and occupiers of houses, buildings, and property (other than land) shall pay" a certain poor-rate. The appellants owned a canal and towing-path, bridges, and a dry-dock, lined with masonry, which formed part of the canal and towing-path, and was used only for repairing canal-boats. *Held*, that said property must be rated as land.—*Reg.* v. *Overseers of Neath*, L. R. 6 Q. B. 707.

See Damages, 1, 2; Limitations, Statute of, 2; Prize; Railway.

Status.—*See* Domicile, 2.

Statute of Frauds.—*See* Frauds, Statute of.

Statute of Limitations.—*See* Limitations, Statute of.

Surety.

1. A debtor executed an assignment for the benefit of creditors, the assignees to carry on the debtor's business and pay the creditor's debts ratable out of all moneys received. The creditors executed a release with a proviso reserving their rights against sureties. *Held*, that the release operated merely as a covenant not to sue, and did not extinguish the debts, and that the rights against sureties were preserved.—*Bateson* v. *Gosling*, L. R. 7 C. P. 9.

2. A principal on a note paid the amount of the same by way of fraudulent preference to the payee, who was innocent of the fraud, and who on notice thereof repaid the amount to the trustees for creditors *Held*, that said payment did not discharge the surety.—*Petty* v. *Cooke*, L. R. 6 Q. B. 790.

See Bankruptcy, 1.

Surrender.—*See* Company, 2; Devise, 2.

Survivorship.—*See* Bequest, 2.

Tax.—*See* Statute.

Tenant at Sufferance.—*See* Limitations, Statute of, 2.

Tenant at Will.—*See* Limitations, Statute of, 2

Tenant for Life.

A testator devised estates to the plaintiff for life without impeachment of waste, with remainder over. His personal estate to be sold and invested in land upon the same trusts. The plaintiff applied to the court to order that the purchase-money of said personal estate and of real estate sold, should be applied to reimbursing him for improvements on the mansion-house; for further repairs and additional rooms to be made in the same; for new cottages and for rebuilding a public-house on the estate. The remainder-men objected. *Held*, that sums already expended could never be repaid unless constituting a charge upon the inheritance, which was not the case here; that the court had jurisdiction to order the same if the remainder-men objected; and that outlays in repairing could not be sanctioned, as it was the duty of the tenant for life to keep up the buildings, although he was by law dispunishable for waste.—*In re Leigh's Estate*, L. R. 6 Ch. 887.

See Bequest, 2, 6.

Tenant in Common.—*See* Adverse Possession; Bequest, 11; Devise, 3; Joint Tenancy.

Tender.—*See* Salvage, 1.

Title.—*See* Equity of Redemption; Landlord and Tenant; Trover.

Tort.

A judgment in an action against one of two joint tort-feasors, without satisfaction, is a bar to an action against the other for the same cause.—*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584

Trover.

A judgment in trover without satisfaction does not vest the property in the defendant.—*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584.

Trust.

1. B. by deed transferred a debenture to three persons with no declaration of trust. Shortly before, B. had written to his solicitor, naming said persons as trustees and stating the trust of a proposed settlement of the debenture to be "for my niece M. and her children." *Held*, that a trust was sufficiently declared for M. for life, remainder to her children as joint tenants.—*In re Bellasis' Trust*, L. R. 12 Eq. 218.

2. Trustee who lost the trust fund by the fraud of their solicitor, to whom the fund was intrusted for investment in a mortgage, were *held* liable for the loss.—*Sutton* v. *Wilders*, L. R. 12 Eq. 373.

See Bequest, 1; Devise, 2–5; Equity, 1; Executors and Administrators, 1; Insurance, 2; Reversionary Interest; Security; Settlement, 1, 2.

Ultra Vires.

1. By articles of association of a telegraph company its directors had power to sell the line. Three directors constituted a quorum for the transaction of business at any meeting. Two directors wrote a letter agreeing as directors to pay to the plaintiff 25 per cent. if he sold the line on certain terms, and to sign a legal obligation to such effect when called upon, and get the signatures of their co-directors to the same. The letter was sent to another director, who returned it signed by himself and another. The sale was effected, and adopted by the company. *Held*, that the above agreement was not *ultra vires*; and that three directors having concurred, it was unnecessary that they should have actually held conference in assembly together. The 25 per cent. was allowed the plaintiff.—*In re Bonelli's Telegraph Co.*, L. R. 12 Eq. 246.

2. The objects of a society by its certified rules were to purchase real or leasehold estate, and to erect buildings thereon. Said rule contained no power to borrow, but an additional rule was adopted allowing the directors to borrow for the purposes of the society. D. lent to the society money which was lent by the directors to another building society. *Held*, that borrowing for such purposes was *ultra vires* of the directors, and that D.'s claim could not be enforced against the company.—*Davis's Case*, L. R. 12 Eq. 516.

See Security.

Usury.—*See* Equity, 2.

Vendor and Purchaser.—*See* Reservation; Sale; Specific Performance, 2.

Vested Interest.—*See* Bequest. 5, 8, 12.

War.

A German ship, having a cargo of nitrate of soda, useful in the manufacture of gunpowder, arrived off Dunkirk, where the cargo was to be delivered, on July 16, 1870, and took a pilot on board, who told the master that war had been declared two days before between France and Germany. The tide was such that the vessel could not have entered Dunkirk before the afternoon of the 17th. The master had his vessel taken to the Downs, that he might there ascertain whether war had broken out or not, and there anchored on Sunday, July 17. That day he could obtain no information, but on Monday, the 18th, he telegraphed the owner, who forbade his proceeding to Dunkirk. On the 19th war was declared, and on the same day the vessel went to Dover as the nearest and safest port. There the charterers demanded the cargo, but did not offer *pro rata* freight, and the master refused to deliver. *Held*, first, that war may exist *de facto* so as to affect the subjects of a belligerent state either without a declaration on either side, or before a declaration, or with a unilateral declaration only, and that in the above case war had either broken out on the 17th of July, or was so imminent as to render Dunkirk an *unsafe* port, and the vessel was therefore not bound to enter; also, that she was justified in pausing to make inquires as to whether war had broken out. Second, that the master was not bound to deliver the cargo without any payment of freight either *pro rata itineris*, or by way of carriage to Dover.—*The Teutonia*, L. R. 3 Ad. & Ec. 394.

See Charter-party, 2, 3.

Warranty.

H. bought a horse warranted in a certain respect, to be returned before a certain day if not answering to its description. H. was told by a groom that the horse did not answer to the warranty, but took it home, where it met with an accident, whereupon H. returned it before the said day. *Held*, that neither the taking away the horse, nor its subsequent injury, deprived H. of his right to return it.—*Head* v. *Tattersall*, L. R. 7 Ex. 7.

Waste.—*See* Tenant for Life.

Way.

1. A lessor demised a certain dock, as follows: bound on the west "by a roadway or passage running between" said dock and certain warehouses, "together with the free liberty and right of way and passage, and of ingress, egress, and regress to and for the lessees, their workmen, and servants, and all and every other persons and person by their permission, in, by, through, and over said roadway or passage jointly with the lessor." A portion of said passage-way next to the warehouses was partially fenced in. *Held*, that the right of way extended over the whole passage-way, but not foot-passengers only.—*Cousens* v. *Rose*, L. R. 12 Eq. 366.

2. The owner of land who had dedicated a footway over the same to the public, conveyed material to and from his premises across said footway in waggons. It was found "that the freehold property in question could not be reasonably enjoyed without access to the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare." *Held*, that as one who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public, said owner might convey material as above.—*St. Mary, Newington* v. *Jacobs*, 7 Q. B. 47.

Will.

1. Lopez, the dictator of Paraguay, made Mrs. Lynch his universal legatee, and she claimed probate of his will in England. By decree of the Paraguayan government about two months after the death of Lopez, all the latter's property, wherever situated, was declared to be the property of Paraguay. *Held*, that the right to claim probate and succession to personal property depended on the law of Paraguay at the time of Lopez's death.—*Lynch* v. *Provisional Government of Paraguay*, L. R. 2 P. & D. 268.

2. After a testator had signed his will he inserted a clause above his signature, after which the attested witnesses signed their names. *Held*, that as the testator had neither signed nor acknowledged his will after inserting the clause, probate must issue without including the same. 15 Vict. c. 24.—*In the Goods of Arthur*, L. R. 2 P. & D. 273.

3. A testator executed his will in the presence of A. and B., and A. attested the same as witness, and B. signed opposite the word "executors." There was doubt whether the testator, who was an ignorant person, asked B. to sign as witness or executor. The court *held* that B., *primâ facie*, signed as witness as well as executor.—*Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300.

See Bequest; Condition; Devise; Evidence; Executors and Administrators; Illegitimate Children; Joint Tenancy; Mortmain; Partnership; Power, 2; Reversionary Interest.

Witness.—*See* Will, 3.

Words.—"*If they shall die leaving issue*," *See* Devise. "*Moneys*," *See* Bequest 7. "*Participate*," *See* Bequest, 11. "*Without Prejudice*," *See* Limitations, Statute of, 1.

APPOINTMENTS TO OFFICE.

DEPUTY JUDGES.

JOHN WARISON, of the Town of Goderich, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Huron for and during the absence of six months' leave, from 1st of April inst., of Seeker Brough, Esquire, Judge of the County Court of the said County. (Gazetted June 22nd, 1872.)

JAMES ALEXANDER HENDERSON, of the City of Kingston, of Osgoode Hall, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Frontenac. (Gazetted June 22nd, 1872.)

COUNTY ATTORNEY.

JOHN EDWIN FAREWELL, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney in and for the County of Ontario in the room and stead of Samuel H. Cochrane, Esquire, deceased. (Gazetted May 4th, 1872.)

REGISTRAR.

RODERICK McBAIN ROSE, of the City of Kingston, Esquire, to be Registrar of and for the County of Frontenac, in the room and stead of James Durand, deceased. (Gazetted May 25th, 1872.)

NOTARIES PUBLIC FOR ONTARIO.

WILLIAM McDOWELL, of the Village of Erin, Gentleman, Attorney-at-Law. (Gazetted April 27th, 1872.)

FREDERICK BURNHAM, of the Town of Peterborough, Esquire, Barrister-at-Law.

GEORGE S. HOLMSTED, of the City of Toronto, Esquire, Barrister-at-Law.

ADOLPHUS WILLIAM, of the Village of Welland, Gentleman, Attorney-at-Law. (Gazetted May 4, 1872.)

GEORGE A. BOOMER, of the City of Toronto, Esquire, Barrister-at-Law.

ARTHUR GODFREY MOLSON SPRAGGE, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted May 11th, 1872.)

WILLIAM G. McWILLIAMS, of the City of Toronto; and SUTHERLAND MALCOLMSON, of the Village of Clinton, Esquires, Barristers-at-Law, and WILLIAM McBRIDE, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted May 25th, 1872.)

GEORGE WILLIAM HERBERT BALL, of the Town of Galt, Esquire, Barrister-at-Law.

JAY KETCHUM, of the Town of Lindsay, gentleman, Attorney-at-Law. (Gazetted June 1st, 1872.)

JOHN CRERAR, of the City of Hamilton, Esquire, Barrister-at-Law.

HENRY HATTON STRATHY, of the Town of Barrie; and EDWARD BURNS, of the Village of Elora, Esquires, Barristers-at-Law. (Gazetted June 8th, 1872.)

LINDSAY HALL, of the Village of Aurora, Esquire, Barrister-at-Law. (Gazetted June 8th, 1872.)

JOHN FRANCIS CAMPBELL HALDAN, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted June 22nd, 1872.)

ASSOCIATE CORONERS.

JAMES ACLAND DE LA HOOKE, Esquire, M.D., for the County of York.

PETER McDONALD, Esquire, M.D., for the County of Norfolk. (Gazetted April 6th, 1872.)

SYLVESTER LLOYD FREEL, Esquire, M.D., for the County of York. (Gazetted April 13th, 1872.)

SAMUEL BYTH SMALL, Esquire, M.D., for the County of Huron. (Gazetted April 20th, 1872.)

WILLIAM E. JOHNSTON, Esquire, for the United Counties of Northumberland and Durham.

GEORGE W. WOOD, Esquire, M.D., for the County of Norfolk.

HUGH M. McKAY, Esquire, M.D., for the County of Oxford.

WILLIAM NODEN, Esquire, M.D., for the United Counties of Northumberland and Durham. (Gazetted May 11th, 1872.)

THOMAS WYRE VARDON, and HENRY ULLYOT, Esquires, M.D., for the County of Waterloo. (Gazetted May 25th, 1872.)

AUTUMN ASSIZES.

EASTERN CIRCUIT.

(Hon. Mr. Justice Gwynne.)

Perth	Wednesday	11th Sept.
Pembroke	Tuesday	17th Sept.
L'Orignal	Monday	23rd Sept.
Cornwall	Friday	27th Sept.
Ottawa	Thursday	3rd October.
Brockville	Tuesday	15th October.
Kingston	Tuesday	22nd October.

MIDLAND CIRCUIT.

(The Hon. Mr. Justice Galt.)

Napanee	Monday	9th Sept.
Picton	Friday	13th Sept.
Belleville	Wednesday	18th Sept.
Lindsay	Monday	7th October.
Peterborough	Monday	14th October.
Coburg	Monday	21st October.
Whitby	Wednesday	30th October.

NIAGARA CIRCUIT.

(The Hon. Mr. Justice Wilson.)

Owen Sound	Tuesday	17th Sept.
Milton	Monday	23rd Sept.
Hamilton	Monday	30th Sept.
St. Catharines	Monday	21st October.
Welland	Monday	28th October.
Barrie	Monday	4th November

OXFORD CIRCUIT.

(The Hon. Justice Morrison.)

Cayuga	Thursday	12th Sept.
Berlin	Monday	16th Sept.
Brantford	Monday	23rd Sept.
Simcoe	Monday	14th October.
Woodstock	Monday	21st October.
Stratford	Monday	28th October.
Guelph	Monday	4th November

WESTERN CIRCUIT.

(The Hon. the Chief Justice of the Common Pleas.)

Walkerton	Monday	16th Sept.
Goderich	Monday	23rd Sept.
London	Tuesday	1st October.
Sarnia	Monday	14th October.
Sandwich	Friday	18th October.
Chatham	Monday	28th October.
St. Thomas	Tuesday	5th November.

HOME CIRCUIT.

(The Hon. the Chief Justice of Ontario.)

Brampton	Tuesday	24th Sept.
City of Toronto	Tuesday	1st October

DIARY FOR AUGUST.

1. Tues.. *Lammas.*
4. SUN.. *10th Sunday after Trinity.*
11. SUN.. *11th Sunday after Trinity.*
14. Wed.. Last day for County Clerks to certify County rates to Municipalities in Counties.
18. SUN.. *12th Sunday after Trinity.*
21. Wed.. Long Vacation ends. Last day for setting down and giving notice for re-hearing in Chancery.
25. SUN.. *13th Sunday after Trinity.*
29. Thurs. Re-hearing Term in Chancery commences.

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THE

Canada Law Journal.

AUGUST, 1872.

The Philadelphia *Legal Gazette*, referring to the congress of lawyers held not long since in Germany, is struck with the thought that this is the age of conventions and assemblies. The suggestion is then made that Pennsylvania should commence to form Bar organizations, should call upon the other States to do the same, and then when a complete organization has been effected, that a national congress of lawyers should be summoned, and through it that the *Bar of the whole world* should be invited to send delegates to an international congress of lawyers to be held at Philadelphia during the Centennial Exhibition of 1876.

The English law officers of the Crown are now to a certain extent salaried officers. That is to say, the Attorney-General is to receive £7,000 a year, and the Solicitor-General £6,000 for non-contentious business, *i. e.*, in lieu of patent fees and honorary briefs. As to contentious business the law officers are to receive, as before, fees therefor, and for opinions connected with it, according to the ordinary professional scale. It is to be observed also that these new regulations do by no means interfere with the private practice of these eminent officials.

Mr. George Richardson, elected Mayor of Salisbury last year, refused to qualify, and was thereupon fined £100. One of our U. S. exchanges manifests considerable astonishment—remarking that it never heard of any person who had been elected Mayor of any of the cities of America refusing to qualify.

Under the title of "A Sweeping Reform," the English *Law Journal* publishes a letter from a correspondent, timidly recommending that every solicitor who has been certificated and in practice three years, should have the privilege of taking all oaths and affidavits in all the courts. There are still a few things in which we are a-head of our professional brethren in England.

ON JUDICIAL EXPRESSION.

While borrowing an idea from the treatise of the late Mr. Coode, on "Legislative Expression," we have no intention of dipping more deeply into legal matters than is warranted by the state of the thermometer. We fully appreciate being in the midst of vacation, which some miserable sinners in England think should be abolished, because banks, &c., have no such seasons of intermitted exertion. Against this short-sighted view, we quote the opinions of Alderson, B., expressed with his usual felicity, though in a somewhat extra-judicial manner:

"My holidays, my holidays!
'Tis over, and now I am free
From the subtle draughtsman's tangled maze,
As he weaves the vacation plea.

My holidays, my holidays!
Now beneath the tranquil night,
And the twilight walk, and the upward gaze
At those distant orbs so bright;
While the swelling wave 'mid the pebbles plays,
And breaks with a gleam of light."

Let subtle draughtsmen weave their mazes, pending vacation; all sensible lawyers will hail this time of emancipation.

True to our severe legal instincts, we have managed to find, even in professional reading, some matters not unsuited for the relaxation of holiday hours. In looking over our recent exchanges, we note a few remarkable utterances of the United States Bench, that have suggested some possages from the sayings and doings of English judges; and our *olla podrida* is now before our readers.

In *Everhart* v. *Searle*, the Supreme Court of Pennsylvania, on the 13th May, 1872, decided the question that a person who is the agent for the sale of certain land cannot also act as agent for the purchase of that land, and by consequence cannot recover anything for his services in purchasing. This, by the way, is in principle the same thing as was decided by Wilson, J., in *The Ontario Bank* v. *Fisher*, 4 P. R. 22, where he held that a city principal could not represent as agent in the same case attorneys on opposite sides. However, in the Philadelphia case, Thompson, C. J., announces his judgment by saying:

"The case before us is rather novel. It involves a question, whether the same person may be an agent in a private transaction for both parties, without the consent of both, so as to entitle him to compensation from both or either. We have the authority of Holy Writ for saying that 'no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.' All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence."

This sort of citation appears to be much relished by the American judges. Thus, in *Henshaw* v. *Foster*, 9 Pick. 317, Parker, C. J., after referring to the maxim, "*Qui hæret in literâ hæret in cortice*," says "'The letter killeth, but the spirit maketh alive,' is the most forcible expression of Scripture." In England and Canada such a practice is now-a-days unknown, and we are rather glad it is so. But in olden times, the judges of England, not unmindful of dedications and the like, whether they were styled *très Sage et très Reverend*, deemed it becoming to their dignity to garnish their deliverances with Scripture texts. For example, Mr. Justice Fortescue cites a very old precedent in support of the doctrine that a man should not be condemned before being heard: "I have heard it observed," he says, by a very learned man, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam, where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shoudst not eat?' And the same question was put to Eve also." This passage was cited by Maule, J., in *Alley* v. *Dale*. Another case, before the Quarter Sessions at Philadelphia, merits notice for the peculiar way in which the judge (Ludlow, J.) charged the jury, in an indictment under the Sunday law, for liquor sold on that day in the hostelry of one Jacob Valer. He first recommends the jury "to discard every outside consideration, and to rise above the surrounding atmosphere in their deliberations upon the questions presented, with an earnest effort to seek for and discern the truth under the law of our land." Then, after reading out the statute to the jury, he proceeds thus:

"The testimony in this case is, that on a Sunday night, by a sort of prearrangement, these four persons, the witnesses, went into the house of one Jacob Valer; that they saw the lights burning, the tables around the room, and that they asked for whiskey, lemonade and segars; and that thereupon the whiskey, or that which

seemed to be whiskey—it is for the jury to say whether the fact is established—was presented to one person. It is not indictable to drink lemonade on a Sunday, or to smoke, but to drink liquor is indictable. It is alleged that these articles were furnished, and one of the witnesses swears that one of the articles produced was whiskey, for he smelled of the article, and so determined that it was whiskey.

"Upon the question of what day it was, you have the testimony of these witnesses—it was Sunday. In the second place, as to what they drank, you have the testimony of these witnesses. It is for you to determine what they ordered, and what they drank—and paid for, by the way.

"Lastly—and this is the most important point of all—who sold this article, if it was liquor? Who furnished it? Well, it is alleged that a man named Jacob Valer furnished it; that a person named Jacob Valer has a license for that house; that he had it considerably before this prosecution was instituted; that he, Valer, took out that license, and entered a bond, which is signed Jacob Valer. There is no testimony here, speaking as I now do with the utmost possible accuracy, as to whether this man Jacob Valer, *this* Jacob Valer, signed the bond. The question is, however, for you to decide, whether he, that is, this defendant, did or did not take out a license for that house—whether he is the identical man."

The learned judge, in his eagerness to secure his re-election by a *publican* vote, forgets that the identity of name (especially when that name was not "John Smith") is evidence of identity of the person. The judge then proceeds to bring down the case to the level of the commonest understanding, by explaining what is meant by *prima facie* evidence—it being noteworthy, however, that *all the evidence* before him was against the defendant:

"The presumption of law is, that in the ordinary and usual line of business, the employees of an establishment act under the direction and by the permission of the chief of the establishment. That, however, is only *prima facie* evidence, that is, evidence in the first place, evidence at the outset, at first blush: that is the general meaning of the words *prima facie*. If it is established as a fact, *prima facie*, in the first place, it then devolves upon the defendant to disprove the fact, either by the circumstances surrounding the case, or by positive evidence. I will illustrate what I mean by *prima facie* evidence. A receipt is said to be *prima facie* evidence of the payment of a debt. Suppose I owe a man one hundred dollars, and when I pay him he gives me a receipt; that receipt is in the first place evidence of payment. But he may show that I have not paid the debt after all. So here, where business is carried on in the ordinary and usual way, it is, in the first place, evidence that it was carried on with the consent of the owner or proprietor of the house. But the proprietor may rebut that assumption by evidence, either direct and positive, that he prohibited the business, or by evidence of all the surrounding circumstances of the case tending to prove the fact.

"Here the testimony is, that this business was carried on, and carried on in the absence of Valer; that is, there is no proof that he was there when the liquor was sold, if it was liquor. Now, it is for the jury to say whether these servants in the room acted by his (Valer's) order, and with his consent; or whether they can, from all the circumstances surrounding the case, draw an inference which rebuts that presumption, and which inclines the jury to believe that it was against his (Valer's) desire that the place was kept open and articles sold."

We are glad that our lot has fallen in a country where a Judge Ludlow has not taken root. But even this curious specimen falls far short of the familiar charges and quaint illustrations with which that good, old-fashioned, honest judge, Mr. Justice Burrough, was wont to elucidate the technicalities of counsel for the benefit of the jury. He once began an address to them after this fashion: "Gentlemen, you have been told that the first is a *consequential issue*. Now, perhaps you don't know what a consequential issue means, but I dare say you understand ninepins. Well, then, if you deliver your bowl so as to strike the front pin in a particular direction, down go the rest. Just so it is with these counts;—knock down the first, and all the rest will go to the ground. That's what we call a consequential issue."

The third and last specimen of judicial expression we cite is taken from an Illinois case, decided by Williams, C. J., in the Circuit Court of Cook County, in June of this year. Therein it became necessary to decide whether a cemetery was a nuisance, so that the State could interfere with a cemetery corporation, and the court thus rhapsodizes on the theme:

"Cemeteries are not only a necessity, but the civilization and culture of this age demands cemeteries ample and attractive, selected with reference to natural scenery as well as convenience; where art many vie with nature, and taste supplement capital in rendering the spot a beautiful home for our dead. Such places cannot be secured except by the lavish expenditure of

money, and the employment of skilled labor, and this necessitates the creation of cemetery corporations.

"The cemeteries in the vicinage of our large American cities, beautified and ornamented as as they are by the application of taste and capital, have become favourite resorts, not only to the many who have deposited in them their dearest treasures, but to other thousands who visit them to enjoy their scenery and be refreshed in their shade. On Sundays and holidays they serve as public parks for the lovers of natural beauty, while others are drawn to them by a stronger love. Instead, therefore, of interfering with the health, welfare and comfort of society, they actually greatly enhance these, serving also for the necessary object for which they were more immediately designed."

One would search in vain through the English or Canadian reports to find a passage at all equal to this in rhetoric. Something approaching it might be culled from the Irish Bench. But the only thing we happen to know fit to be cited in the same page is another effusion of another American judge.

"None but themselves can be their parallel." Strange to say it was suggested by a similar funereal subject, and may be found reported in *The Commonwealth* v. *Viall*, 2 Allen 512, upon an indictment against the defendant for cutting down trees in a burial-ground. Mr. Justice Hoar, in delivering the opinion of the Court, observes, "The growth of these trees may have been watched with affectionate interest by friends and relatives of the departed, whose last resting-place has been made more pleasant to the imagination of the survivors, by the thought that it might become a resort of birds, and a place for wild-flowers to grow; that waving boughs would shelter it from summer heat, and protect it from the bleak winds of the ocean. The fallen leaf and the withered branch are emblems of mortality; and in the opinion of many, a tree is a more natural and fitting decoration of a cemetery than a costly monument."

It is time to close our rambling observations. If judges would more closely follow the lead of Williams, C. J., and Hoar, J., we should find that the favourite sea-side authors, companions of summer stollers, would cease to be Tennyson and the rest of the poetical tribe in blue and gold; the reporters in law-calf arrayed would come into well-deserved pre-eminence. Let the American judges imitate Baron Alderson. If they feel poetic stirrings, let them exhale the divine afflatus into other receptacles than "the judgment of the Court."

LAW OF EVIDENCE.

There is this session before the English House of Commons a bill for the amendment of the Law of Evidence, many provisions of which will prove suggestive to Canadian lawyers and legislators. By it, accused persons would be competent, but not compellable, to give evidence. As we lately noted, such laws are becoming common in the States, and with certain limitations they may possibly work well.

It provides also that husbands and wives, in every proceeding, both civil and criminal, are to be competent and compellable to give evidence for or against each other, provided that any communication made by husband or wife by the other during marriage shall be privileged. We would call attention to the decision, *Storey* v. *Veach*, 22 C. P. 164, where, in an action by husband and wife for an injury sustained by the wife (the husband being joined merely for conformity), it was held that the mouths of both plaintiffs were shut, while the defendant could, under our statute, give his evidence against them. In view of this decision, some amendment of the law of evidence, as it relates to husband and wife, would seem to be called for in this Province.

Another matter in the English bill is that a barrister, solicitor, attorney, or clergyman of any religious persuasion, shall not be bound to disclose any communication made to him confidentially in his professional character. Upon this, some correspondence has lately appeared in our columns. As regards privilege of clergymen, we understand there is a very important case now pending in the Court of Chancery (*Keith* v. *Lynch*), where one of the defendants, a Roman Catholic clergyman, refuses to disclose matters communicated to him in the confessional. It is not improbable that some of the questions raised, but not decided, in *Cullen* v. *Cullen*, and adverted to by Strong, V. C., in *Elmsley* v. *Madden*, 18 Gr. 389, touching the Treaty of Paris and the Quebec Act, will have to be decided in *Keith* v. *Lynch*.

Among other changes (some of which have evidently been suggested by Parliamentary

Election Law, the Tichbourne *cause célèbre*, and the practice in Chancery), we further note the following in the bill we have referred to:

"A witness is not to be excused from answering on the ground of criminating himself, but no answer so given shall be used against him in any criminal proceedings, or in any proceeding for a penalty or forfeiture. The improper admission or rejection of evidence shall not be ground of itself for a new trial or for the refusal of any decision in any case, if it shall appear to the court before whom such an objection is raised that independently of the evidence objected to and admitted there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision. A witness shall not be bound to produce any document in his possession not relevant or material to the case of the party requiring its production, nor any confidential writing or correspondence which may have passed between him and any legal professional adviser. An impression of a document made by a copying machine shall be taken *prima facie* to be a correct copy."

SELECTIONS.

LIABILITY OF RAILWAY COMPANY—FIRE COMMUNICATED BY LOCOMOTIVE.

No invention of modern mind or appliance of modern civilization has been more prolific in results or more fruitful in litigations than railroads. Railroad cases constitute, in fact, the largest single department of litigation to which the attention of our higher courts is called. Upon the particular subject of the liability of railway companies in case of fire communicated by locomotive engines, more than a quarter of a hundred cases have been decided in the higher courts of England and the United States. Soon after the introduction of railways in England the question arose as to whether railway companies were not liable *absolutely* for any damage that might occur in consequence of fire from locomotives (*King* v. *Pearse*, 4 B. and Ad. 30), but it was early decided that the legislative body of the State, in conferring privileges and franchises on railways, did not thereby impose any such absolute liability upon them. But it appears that this principle demanded reiteration even so late as 1860, when the full court of exchequer, in *Vaughan* v. *Taff Vale R. R. Co.*, 5 Hurlst and Norm. 679; s. c. below, 3 id. 743, decided that a railway company was only responsible for the negligent use of fire in locomotives. Chief Justice Cockburn, in this case, said: "The defendants used fire for the purpose of propelling locomotive engines, and no doubt they were bound to to take proper precautions to prevent injury to persons through whose land they passed; but the mere use of fire in such engines does not make them liable for injury resulting from such use without any negligence on their part." The following cases, however, well establish the doctrine in England that it is only in cases of negligence that the railway companies are liable for damages by fire from engines: *King* v. *Pearse*, *supra*; *Aldridge* v. *The Great Western R. R. Co.*, 3 Man. and Gr. 515; s. c 42 E. C. L. 272; *Piggott* v. *Eastern Counties R. R. Co.*, 3 Man. Gr. and Scott; s. c., 54 E. C. L. 228; *Gibson* v. *The South-Eastern R. R. Co.*, 1 Fos. and Fin. 23; *Vaughan* v. *Taff Vale R. R. Co.*, *supra*; *Fremantle* v. *The London & North-Western R. R. Co.*, 10 C. B. N. S.; s. c., 100 E. C. L. 89; *Smith* v. *London, etc., R. R. Co.*, L. R. 5 C. P. 98. In the United States, in the absence of statutory regulation, the same doctrine prevails as in England. Negligence alone subjects the company to liability in case of damage.

In Massachusetts by general statutes, chapter 63, section 101, it is provided that "every (railroad) corporation shall be responsible in damage, to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines; and it shall have an insurable interest in the property along the route for which it may be so held responsible, and may procure insurance thereon in its behalf." The wisdom and policy of such a statute is, of course, purely a matter for the legislature of the State to be affected thereby; but the Massachusetts law is undeniably arbitrary, and fails even of suppressing litigation upon the precise point under discussion. See *Hart* v. *Western R. R. Co.*, 13 Metc. 99; *Ingersoll* v. *Stockbridge & Pittsfield R. R. Co.*, 8 Allen. 438; *Ross* v. *Boston & Worcester R. R. Co.*, 6 id. 87; *Perley* v. *Eastern R. R. Co.*, 98 Mass. 414, and others. The rule that railway companies are liable for negligent use of fire in locomotives having been thoroughly established, it becomes expedient next to consider the nature and scope of the negligent consequences to which the liability extends. The cases naturally divide themselves into three classes: 1. Where the negligence is solely that of one of the parties. 2. Where the negligence is contributory. 3. Where there is a distinction between direct and remote damages. There is one other limited class of cases which will be noticed at the close of this article, relative to damages, by fire from locomotives, to goods in the possession of the company. Under the first division it is first observable that railway companies are bound to use screens, caps or other requisite appliances to prevent the escape of fire or sparks from the smoke pipe. In *Bedell* v. *The Long Island R. R. Co.*, 4 Am. Rep. (44 N.Y. 367) it appeared that a "spark arrester" had been used upon the smoke pipe of the engine from which fire had communicated to plaintiff's house, but it had been removed, and this alone was held

sufficient to go to the jury on the question of negligence. See, also, *Albridge* v. *The Great Western R. R. Co.*, *supra*; *Piggott* v. *Eastern Counties R. R. Co.*, *supra*; *Gibson* v. *The South-Eastern R. R. Co.*, *supra*.

The omission of all these appliances and precautions, and the fact that premises are set on fire by engines thus driven, would be a *prima facie* case of negligence. 1 Redfield on Railways 452. In *Gibson* v. *South-Eastern R. R. Co.*, *supra*, it was shewn "that sparks flew out of the engine and fell upon the herbage and pasturage, and set it on fire;" and Watson, B., said: "That is sufficient evidence according to the cases." In some cases the negligence is not entirely in the management or construction of the locomotive. In *Smith* v. *The London and South-Western R. R. Co.*, *supra*, the company's servants had been employed in cutting grass and trimming hedges at the side of the track, and had heaped together the cuttings, and allowed them to remain fourteen days. This heap caught fire from a locomotive, and was carried across a stubble field and a public road 200 yards to the cottage of plaintiff, which was burned. The Court held that there was evidence for the jury on the question of negligence, although there was no suggestion that the engine itself was improperly constructed or driven. The jury found for plaintiff, and the court on appeal refused to interfere. See, also, *Gibson* v. *The South-Eastern R. R. Co.*, 1 Fos. & Fin. 23; *Vaughan* v. *Taff Vale R. R. Co.*, 5 Hurlst. & Norm. 679. Under the Massachusetts statute, several cases of this character have arisen. In *Perley* v. *Eastern R. R. Co.*, 98 Mass. 414, a wood lot half a mile distant from the track was ignited; the sparks set fire to the grass in the open field, and spread without any break in the direction of the wood lot, over the premises of several different proprietors, and finally burned the wood lot in suit. The court held the company liable. In *Hart* v. *Western R. R. Co.*, 13 Metc. 99, the fire was communicated from the engine to a carpenter's shop, thence, by wind driven sparks, sixty feet to plaintiff's dwelling, which was consumed, and the company was held liable. In *Ingersoll* v. *Stockbridge and Pittsfield R. R. Co.*, 8 Allen 438, the fire was communicated from the locomotive to a barn, thence through a shed to plaintiff's barn, and the company was held liable. See, also, *Ross* v. *Boston and Worcester R. R. Co.*, 6 Allen 87. We come now to the second class of cases wherein the injured party contributes to the loss.

These cases have arisen usually where fire has been communicated to grass, etc., or any combustible material lying near the track. In *Ill. Central R. R. Co.* v. *Mills*, 42 Ill. 407, which was an action to recover for a stack of hay burned in consequence of fire communicated through grass and weeds from the locomotive of the company, the court said: "The company were bound to use the same diligence in removing dry weeds and grass and all other combustible material, from exposure to ignition by the locomotive, that a cautious and prudent man would use in reference to combustible materials on his own premises if exposed to the same hazard from fire as dry grass upon the side of a railway." And it is a question for the jury whether the company has exercised this care, and whether the injured party has contributed to the injury by leaving combustible material upon his own land adjoining the railroad. See, also, *The Ohio & Miss. R. R. Co.* v. *Shanefelt*, 47 Ill. 497; *Ill. Central R.R. Co.* v. *Frazier*, id. 505; overruling *Bass* v. *Chi. Bur. & Qu. R. R. Co.*, 28 id. 9; *Chicago & N. R. R. Co.* v. *Simmons*, 54 id. 504. In this last case above mentioned the court said that "land owners contiguous to railways were as much bound, in law, to keep their lands free from an accumulation of dry grass and weeds as railroad companies were; so when a fire is ignited on a company's right of way, and is communicated to fields adjoining, the negligence of such owner will be held to have contributed to the loss, and, unless it appears the negligence of the company was greater than that of such land owner, the latter cannot recover for injuries thus arising."

In *Vaughan* v. *The Taff Vale R. R. Co.*, *supra*, which was an action to recover for a wood lot consumed, as was alleged, by fire from a locomotive of defendant company, it appeared that at the time the fire was discovered the wood was burning, but the dry grass on the railway bank had been already burned. Chief Justice Cockburn intimated that if the fire was carried indirectly by the dry grass on the bank to the wood, the defendant would be liable, but if it arose from the sparks not being carried to the bank but direct to the wood which was full of dry combustible material, the defendant would not be liable. It is thus well established, that one who owns land along a railway has a duty to perform in dry seasons when grass and weeds are liable to ignition. But by far the most important part of the discussion is included under the next and third division of cases, wherein the distinction between the direct and remote damages is made. A *resumé* of the discussion, and an observation of the course of decisions, both in England and the United States, will reveal the fact, that not until recently has this distinction been advanced in the courts. In fact the decisions of England do not furnish a single instance of the distinction. So late as *Smith* v. *The London and South-Western R. R. Co.*, *supra*, (decided in 1870), in which fire was carried across a stubble field and a public road 200 yards to a cottage, it was held, without limitation, the plaintiff could recover, the jury having found negligence. In the United States the distinction has not been contended for or judicially recognized except in New York, Pennsylvania, and possibly in

Illinois. In Massachusetts it has been ignored under their statute. *Berley* v. *Eastern R. R. Co.*, 98 Mass. 414. The leading case (and in fact the only case) in New York, which recognizes this doctrine is, *Ryan* v. *New York Central R. R. Co.*, 35 N. Y. 210. In this case it appeared that, by the negligent management of the engine, fire was communicated to a wood-shed of the company, and thence to the house of plaintiff which was destroyed; *held*, that the burning of the house was too remote a consequence of the company's negligence to render it liable therefor.

This case was followed and approved in *Penn. R. R. Co.* v. *Kerr*, 1 Am. Rep. 431 (62 Pa. 353). In this case a warehouse, situated near the railroad track, was set on fire by sparks from one of the company's locomotives, and the fire was communicated from the warehouse to a hotel which was also consumed. *Held*, that the company was not liable for the destruction of the hotel by reason of the injury being too remote. In *Toledo, P. and W. R. R. Co.* v. *Pindar*, to appear in 5 Am. Rep. (53 Ill. 447), it appeared that a building belonging to the company was set on fire negligently by a locomotive, and from the burning building fire was blown across the street, and then communicated to the house of the plaintiff. *Held*, that the question whether the injury was too remote was for the jury. This is the extent of the reported adjudication on this most interested and complicated question of direct and remote damages. At common law, if a man built a fire on his own lands and allow it negligently to escape, he will be liable for the injury resulting thereby to his neighbors. *Turbenville* v. *Stamps*, 1 Ld. Raym. 264; s. c., 1 Salk. 13; *Pantam* v. *Isham*, id. 19; Com. Dig. Actions for Negligence, A. 6. But there must be a line somewhere, where the liability ends, else private individuals and corporations run hazards of which they little dream; and our courts, universally, may find an emergency in which they will be compelled to recognize some such doctrine as has been laid down *positively* in New York and Pennsylvania, and *conditionally* in Illinois.

Finally, we come to the adjudications upon the liability of railroads for damage from fire communicated by locomotives to goods in their charge as common carriers or warehousemen. In *Steinwig* v. *Erie R. R. Co.*, 8 Am. Rep. 673 (48 N. Y. 123) the plaintiff shipped goods over the defendant's railroad. By a clause in the bill of lading, the defendant was released from liability "from damage or loss of any article from or by fire or explosion of any kind." The goods were destroyed while on one of defendant's trains, by fire, which caught from a spark from the engine of the train. *Held*, that the defendants were not, by the stipulation in the bill of lading, released from liability for loss arising from its own negligence. In *Barron* v. *Eldridge*, 1 Am. Rep. 126 (100 Mass. 455), it appeared that flour in sheds and grain in elevators in the possession of defendant railroad company were burned by fire communicated by a locomotive of the company. It appeared further that the flour sheds were situated near the track and were of combustible material, that the fire was communicated first to these sheds and then to the warehouse or elevator, a distance of 250 feet. *Held*, that the company were guilty of negligence as to the grain in the elevators, but that it was a question for the jury whether they were guilty of negligence as to the flour in sheds. These latter cases are governed somewhat by the special contract or relation of carrier or warehousemen and patron. The great question which arises, however, on the liability of railroad companies for fires communicated by their locomotives has been when the relation is that of corporation to individuals independent of special contract, which we have already fully discussed. — *Albany Law Journal.*

FIRES COMMUNICATED BY LOCOMOTIVES — PROXIMATE AND REMOTE DAMAGES.

In a recent article (*ante*, p. 309) we took occasion to discuss in a general way the liability of railway companies for losses by fire, communicated from locomotives. We now propose to consider more definitely and thoroughly the question of proximate and remote, or direct and indirect injuries, in connection with the liabilities of railway companies. As we stated in the article above referred to, the adjudication upon this precise point is exceedingly limited, there being only three cases* reported in which the question (independent of statutory regulations as in Massachusetts) has been presented for judicial determinination in America, and not a single case in which it has been so presented in England. As Judge Hunt remarked in *Ryan* v. *N. Y. Central R. R. Co.*, 35 N. Y. 210, "it will not be useful further to refer to the authorities," and an examination of the subject upon principle, will be the only method which can evolve the true rule of law regulating cases of this character. It is true that the question cannot be called an *open one* in New York or Pennsylvania, nor possibly in Illinois; but in England, and in the great majority of the American States, it is not only novel, but unadjudicated—not only new but *open*. In New York and Pennsylvania not only has the distinction between proximate and remote injuries from fires communicated by locomotives, and a corresponding limitation of liabllity been recognized, but the courts have taken it upon themselves to declare where the line of demarcation shall be drawn. See cases cited *supra*. In Illinois, the Supreme Court, while acknow-

* *Ryan* v. *New York Central R. R. Co.*, 35 N. Y. 210; *Pen. R. R Co.* v. *Kerr*, 1 Am. Rep. 431, (62 Pa. 353); *Toledo, etc., R. R., Co.* v. *Pindar*, 5. Am. Rep. (53 Ill. 447.)

ledging that such a distinction exists, holds that the question whether the damages are too remote is for the jury, thus leaving it to the judgment of these twelve men to determine the point at which the liability of the railway company shall cease. The order of the investigation will, therefore be this: 1, to determine whether the maxim, *causa proxima non remota spectatur* has any application whatever to cases like those under consideration; and, 2, to determine whether—conceding that the distinction between proximate and remote damages is admissible—the question whether the damages are too remote is for the court or the jury.

The existence of the maxim in the common law, *causa proxima non remota spectatur*, does not necessarily imply that it is universally applicable. It may or may not be applicable to railroads, found in the negligent commission of injuries. It is the general rule that a bailee of goods is responsible only for a *degree* of care and prudence in the execution of his trust. But railroads, as common carriers, are liable absolutely for the goods committed to them for carriage, with the dual exception of loss by the act of God or the public enemy. The rule, therefore, that private individuals are responsible only for the direct and proximate, or immediate consequences of injuries inflicted on others is only a *prima facie* argument that railroad companies are only so liable. Railroad companies are so constituted, and occupy such a peculiar and powerful position in the economy of life that special laws may be, and often are, demanded for their control and for their punishment. The special and enormous franchises, privileges and powers conferred upon these corporations, naturally require a correspondingly special and enlarged duty and liability to the public. And when railroads were first established in England, the question arose whether they were not liable *absolutely* for loss by fires communicated by locomotives. This liability was sought to be enforced on the ground of this special and enlarged power and privilege, which the legislature had conferred on railway corporations, but it having been judicially determined that they were only liable for the *negligent* use of fire in locomotives at an early date (*King* v. *Pearse*, 4 B. & Ad. 30), the liability of these corporations has continued thus modified until the present. But it must be conceded that the question of the extent of the liability, when it is once determined that the extent of the liability exists, is quite a different question from that of the existence of any liability at all.

A division of the damages consequent upon a careless or negligent management of a locomotive engine into proximate and remote, necessitates another modification of the rule of liability. Railroads may be the cause of injury to adjoining property in two modes, considered in reference to care or the want of it. For injuries to adjoining property, resulting from want of care, they are liable, according to the well established rule; for injuries occurring, notwithstanding the exercise of care, they are not liable, according to an equally well-established rule. Now, it has been proposed, and, as we have seen, in some states determined, to further divide the injuries occasioned by want of care into two classes—those which are remote and those which are proximate, for the former of which they shall not be liable, and for the latter of which they shall be liable, thus multiplying divisions, and throwing upon our courts the determination of a multitude of new questions arising from unprecedented distinctions. Inasmuch as the distinction sought to be enforced in reference to railways is comparatively new, it seems that those who advocate it ought to assume the burden of proof. But the only argument of any potency and pertinency used by either Judge Hunt in *Ryan* v. *New York Central R. R. Co.*, *supra*, or Judge Thompson in *Penn. R. R. Co.* v. *Kerr*, *supra*, is the rule of the common law, *causa proxima non remota spectatur*, as if all the force of this maxim had not been destroyed by long continued acquiescence both in England and America, in the negation of this distinction in cases of damage by fire from locomotives. The force of this maxim has been neutralized by this continuous acquiescence in the absence of the distinction, and the question is at present in the state in which it would be had the distinction been one altogether new in law, if the distinction contended for were thus new in law, it must be admitted that courts would be exceedingly loath to admit its pertinency in cases of negligent injuries by corporations possessing such immense powers and franchises as have been conferred upon railroads. Such corporations would doubtless be the very last to receive the benefit of the proposed distinction and the corresponding limitation of liability. It becomes, therefore, a grave question whether, admitting that the distinction is expedient and lawful in ordinary cases of injury by private persons, it is also expedient and lawful in cases of injury by corporations; and inasmuch as the rule of unlimited liability for negligent injuries has been almost universally acquiesced in for half a century, or since the advent of railways, and the rise of cases such as are comprehended within the scope of this discussion, some exceedingly potent reasons must be advanced to change the rule of liability. It is said that "a railroad terminating in a city might, by the slightest omission on the part of one of its numerous servants, be made to account for squares burned, the consequence of a spark communicated to a single building."*

Again, it is said: "To sustain such a claim as the present" (for remote damages) "and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet

* Judge Thompson in *R. R. Co.* v. *Kerr*, *supra*.

which no private fortune would be adequate.* But it appears that the argument of the learned judges is directed to the hypothetical consequences of the rule which they oppose. They also seem to consider that there is no difference in principle between the cases of a railroad company and of a private individual. Both of these modes of reasoning we deem unsound. The latter has been sufficiently referred to in the previous portions of this paper. Of the former we have to say that the realities of half a century of railway existence, the exigencies of great injuries occasioned by railroads to property adjoining, and the pecuniary answerability of railway companies, have never warranted any such hypothesis.

In establishing a rule, such as is proposed by what is called the consequential argument, it is acknowledged to be a great fallacy to refer to consequences which only by the most extraordinary coincidences could happen, or to events which are only in the range of possibility. It is *possible* that a spark from a locomotive should become the first of a series of causes which should burn a city, but the hypothesis has nothing to do with the formation of a rule of legal liability; because the nature of things and an observation of the past shows that such a result is *extremely improbable*. And when such a hypothesis is resorted to, to save a railroad company from liability for the indirect burning of a hotel or of a dwelling house, it seems like a misuse of the mode of calculating chances in establishing a rule of law. Railroads have existed, thriven and become the most potent and opulent agency in the whole domain of commercial —and we might add, political—life, under the operation of a rule of law which excludes any distinction between proximate and remote damages, or any limitation of responsibility based on these distinctions. Then why invoke a hypothetical and extremely improbable exigency in the process of establishing a rule of liability for those powerful corporations ?†

But, for the purposes of the discussion, we have decided to concede that such a distinction as proximate and remote damages is admissible in fixing the liability of railroads for losses occasioned to adjoining property by fires communicated from locomotives. We shall then have arrived at the second part of the discussion. We have contended that the courts as a matter of law, ought to hold that the liability of railroads for negligent injuries to adjoining property, should be coextensive with those injuries. But it will be observed that the high courts of New York and Pennsylvania have gone to the other extreme. They not only hold that there is a limit to the liability, which is based on remoteness of result, but they go so far as to declare, in a given case, where that liability ends. *Ryan* v. *New York Central R. R. Co.*, *supra; Penn. R. R. Co.* v. *Kerr*, *supra*. This leaves nothing for the jury to do but to assess the amount of the damages. The Supreme Court of Illinois, however, takes a medium ground and holds that the question of remoteness also is for the jury. The question of the admissibility of the distinction between direct and indirect losses, and the line of demarcation between the two ought to be very well settled to warrant a court in judicially determining what is direct and what is indirect. The line of demarcation seems to be too complex and obscure and not sufficiently arbitrary to warrant a judge in taking the question of remoteness away from the jury entirely and putting his own version upon it. "Remote consequences" is a relative phrase just as "reasonable care" is relative; and the question of negligence in a railroad company, in case of injury to persons or property, is seldom or never taken from the jury, except in cases where a positive enactment has been violated.

The boundaries of proximate consequences have been very properly defined to be the natural, necessary and probable consequences arising from any act. Now the natural, necessary, and probable consequences of fire escaping from a locomotive may and must differ according to circumstances and periods. In a dry time with a high wind, the necessary, natural and probable consequences of the escape of fire from a locomotive would be not only the destruction of buildings immediately adjoining the tract of the company, but also buildings and other property situated at a distance and separated from (say 89 feet, as in *Penn. R. R. Co.* v. *Kerr*, *supra*,) the buildings immediately set on fire by the passing locomotive. Again, immediately after a rain, with no wind, the escape of fire from locomotives in large quantities would scarcely consume a thatched roof adjoining the track, in accordance with this established law of necessary, natural or probable consequence. And inasmuch as the jury is allowed to determine whether there has been a due regard and care in the management and structure of the locomotive when fire escapes and does injury, it seems altogether proper that they should be also allowed to determine what proportion of the consequences of a want of regard and care in such management and structure is necessary, natural and probable.—*Albany Law Journal.*

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*Judge Hunt in *Ryan* v. *R. R. Co.*, *supra*.

†In those extraordinary and exceptional instances where immense conflagrations should ensue from so slight a first cause as a spark from a locomotive negligently managed or constructed, the hardship of the rule of unlimited liability could be easily modified under some general principle like that which excuses a party from the performance of a contract or the discharge of a liability in case of war, superior force, public calamity and the like. So even the assumed necessity for the rule laid down in *Ryan* v. *New York Central R. R. Co.*, and *Penn. R. R. Co.* v. *Kerr*, *supra*, is merely suppositious and has no substantial existence or force.

OWNERSHIP OF SOIL OF HIGHWAYS.

It is a well-known presumption of law that the soil of a highway *prima facie* belongs to the owner of the land intersected by it; and where the land on either side belongs to a different proprietor, each will be entitled to the soil on his side *usque ad medium filum viæ*, or, in plain English, up to the middle of the road (*Doe* v. *Pearsey*, 7 B. & C. 305), whether it be a private road or a public road (*Holmes* v. *Billingham*, 7 C. B. N. S. 329). The presumption has been said to be founded on the supposition that the right to the use of the road was granted by the owner of the soil at some former period, and that his ownership extended originally up to the middle of the road (*White* v. *Hill*, 6 Q. B. 487), a convenient but bold assumption, so that we are not surprised that Lord Denman should have thought in *White* v. *Hill*, that presumptions of this nature were put too high.

It has been recently doubted whether the rule of law as to this presumption applies to the case of a street in a town, or of a site for cottage granted by a land-owner on the side of a public road (*Becket* v. *Corporation of Leeds*, 20 W. R. 454), but this does not go beyond *dicta*. It is, however, settled that the presumption does not arise where the land intersected by the road originally belonged to one person, and part has been granted to one owner and part to another (*White* v. *Hill*, *sup.*); nor does it arise where the highway is one which was originally laid out, under the provisions of an Inclosure Act, across the waste of a manor (*R.* v. *Edmonton*, 1 Moo. & Ray. 24); for there the soil of the highway is considered as remaining vested in the lord of the manor, subject to the right of the public to pass and repass over it (*Poole* v. *Huskisson*, 11 M. & W. 827). Nor does the soil of highways vest in turnpike trustees, where such are appointed under the provisions of the general Turnpike Acts, without a special clause for the purpose, for they are only considered as having the control of the highway (*Daxison* v. *Gill*, 1 East, 69). For this reason, in a case where the trustees of a turnpike road were empowered to lower the level of a road going over a hill, and they moved to restrain the adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct future improvements of the road, Lord Langdale, M.R., declined to interfere (*Cunliffe* v. *Whalley*, 13 Beav. 411). In general, the question whether the soil of a highway has passed by a conveyance of the adjoining land, will depend on the intention of the parties, as manifested by the conveyance. In *Berridge* v. *Ward* (9 W. R. C. L. Dig. 20, 10 C. B. N. S. 400), where a piece of land had been conveyed to a purchaser with general words, the court presumed that the soil *usque ad medium filum viæ* passed by the general words inserted in the the conveyance as appurtenant to the piece of ground specifically granted, though it was in terms excluded by the measurement and colouring of a plan to which reference was made in the conveyance. So, too, in *Simpson* v. *Dendy* (8 C. B. N. S. 433), the conveyance of a field, described as "Chamberlain's Field, containing by admeasurement 3a. 3r. 35p., be the same more or less, abutting towards the west on Hall's Lane," was held to vest in the purchaser a moiety of Hall's Lane. On the other hand, in *Marquis of Salisbury* v. *The Great Northern Railway Co.* (7 W. R. 75), where the defendant company had purchased of the plaintiff a piece of freehold ground abutting on a highway, partly for a site for their line of railway, and partly for the purpose of diverting a portion of the existing highway, it was held that the conveyance to the defendant company did not by implication or otherwise pass that part of the old road which had ceased by the diversion to form part of the highway.

The ground of this decision was the presumable intention of the plaintiff not to part with his freehold in the soil of the road. The circumstance that he had acquiesced in the defendant company's taking possession of and enclosing the disused portion of the old road, might have had more weight with a Court of Equity than it had with the learned judges who tried the case. Any how, the case may be viewed as establishing that the presumption does not arise on the occasion of a sale by a land-owner to a railway company or public body of a piece of ground adjoining the highway.

The next and more important question is, what are the rights of the owners of the soil of a highway with relation to the soil of it, and what are such rights worth? As such owner he is entitled to all profits arising therefrom, both above and underground, subject to the rights of the public (Comyn. Dig. Chimin, A 2), yet such profits, above ground at all events, can seldom be worth much, for obvious reasons. And here it may be observed, first, that where there has been a public highway, no length of time during which it may not have been used will prevent the public from resuming the right if they think fit (*Vooght* v. *Winch*, 2 B. & A. 662); and, secondly, that the public have a *prima facie* right to the entire space between the two hedges, provided it be not of an extraordinary width (*Groove* v. *Wist*, 7 Taunt. 29), and are not confined to the metalled road in actual use by the public, and as such kept in repair (*Rex* v. *Wright*, 3 B. & Ad. 681).

As regards underground profits, the owner of the soil of a road is of course entitled to the mines and minerals thereunder, and must support the surface. No more need be said as to this. As regards profits above ground, his rights are necessarily very restricted. Of all trees, for instance, growing on the side of the highway, he is legally the owner (*Goodtitle* v. *Alken*, 1 Burr. 133); yet if such trees be, in the opinion of the surveyor, an obstruction, he may fell and remove them, although when

felled they belong to the owner of the soil. In a singular case (*Turner* v. *Ringwood Highway Board*, 18 W. R. 424, sec. 14 Sol. Jour. 976), it appeared that a public road had been set out in 1811 by Inclosure Commissioners, with a width of fifty feet. About twenty-five feet only of the fifty feet thus allotted had been used as the actual road; the sides had become covered with heath and furze, through which fir trees had grown up of themselves. In 1858 the Highway Board cut down some of these fir trees, and advertised them for sale; and on bill by the owner of the adjoining land to restrain such cutting, it was held, on the authority of *Reg.* v. *Wright* (*sup.*), that the right of the public was to have the whole width of the road, and not merely that part which had become used as the *via trita* preserved from obstructions; and that such right had not become extinguished by the fact that the trees had been allowed to grow up for the period of twenty-five years; it being the right of the public to have such trees removed on the ground that their growth by the side of the highway was a nuisance. Yet it seems that the adjoining owner had a right to the timber of the trees when so cut down. In *Reg.* v. *United Kingdom Telegraph Co.* (10 W. R. 583), which was an indictment against the defendant company for setting up telegraph posts so as to obstruct the highway, it was distinctly laid down by the Court of Queen's Bench, that where there is a road running between fences, the public have a right to the whole space lying between the fences, and are not confined to the metalled road. No doubt, as Crompton, J., who delivered the judgment of the court, observed, part of the land lying between the fences may be a rock, or from some other cause inaccessible to the public; but such a piece of land would be excluded by those very circumstances, as it could not be called a road or part of a road in any sense. In a case under the 59th section of the 5 & 6 Will. IV. cap. 50, a road was nine feet wide; and there being a piece of uninclosed land at the side of it, also nine feet wide, which land was so rough and uneven that no carriage ever did or could go over it, the owner of the adjoining field took it into his field and put a fence round it. The surveyor of the highway having taken down this fence, it was held that he was not justified in so doing, inasmuch as the fence was not on the road (*Evans* v. *Oakley*, 1 C. & K. 125).

It only remains to add, that the owner of the soil of the highway is entitled to the herbage on the roadside, and may maintain an action of trespass against a stranger who suffers his cattle to depasture along the road (*Devaston* v. *Payne*, 2 H. B. C. 527). It has been held, in a singular case, that there may be trespass in pursuit of game, within the meaning of 1 & 2 Will. IV. cap. 31, where the person charged has never quitted the highway (*Reg.* v. *Pratt*, 3 W. R. 372, 24 L. J. Mag. Cas. 113).

For an instance of a bill to restrain parties from attempting to obtain proprietary rights in the soil of a highway in derogation of the plaintiff's proprietary right in such soil, see *Attorney-General* v. *The United Kingdom Electric Telegraph Co.* (10 W. S. 167), where the alleged injury consisted in the defendant company having laid down telegraph wires in a trench along the greater part of the plaintiff's frontage to the highway.—*Solicitors' Journal.*

LIABILITY OF AN EXECUTOR *DE SON TORT* AND HIS REPRESENTATIVES.

If a person who is neither executor nor administrator intermeddles with the goods of of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what, in our law, is called an executor of his own wrong, or more usually an executor *de son tort*. It is not intended to enumerate the acts which will make a person executor *de son tort*; they may be referred to in Williams' Executors, p. 247, *et seq.*, and the tendency of modern cases will perhaps appear to be to depart from the strictness of some of the old cases which prohibited the exercise of many acts, trivial in themselves, and attributable often to motives of kindness, by a stranger, in reference to the preservation of the property of a deceased person without risk of incurring the responsibilities of a personal representative (see *Serle* v. *Waterworth*, 4 M. & W. 9). It will be seen, however that there is still need for great caution in intermeddling with the affairs or property of a defunct, in order to avoid the unpleasant consequences of finding oneself clothed with this undesirable character. It is well to bear in mind, however, the general rule, that the question whether certain acts were done, is a question of fact for the jury; but whether those acts, if done, make the person doing them an executor *de son tort* is a question of law for the Court (*Padgett* v. *Preist*, 2 T. R. 99).

The unenviable position of an executor *de son tort* has been described by Lord Cottenham as one in which he has all the liabilities but none of the privileges of an executor (*Carmichael* v. *Carmichael*, 2 Phill. 108). This is strikingly illustrated in the matter of the important privilege which a lawful executor has of retaining his own debt against others of equal degree, and even although the debt may be barred by the Statute of Limitations (*Hill* v. *Walker*, 4 K. & J. 166, 6 W. R. Ch. Dig. 25). On the contrary, an executor *de son tort* can not only not retain for his own debt, but he cannot, as against the rightful executor, plead in mitigation of damages payments made in due course of administration, unless the assets be sufficient to satisfy all the debts; for otherwise the rightful executor would be precluded, not only from his undoubted right of giving preference to one creditor over others of equal rank, but also from his equally clear privilege of retain-

ing his own debt in priority to all others of equal degree (*Ellworthy* v. *Sandford*, 12 W. R. 1008, 3 Hurls. & Colt. 330). However, abstracted from the personal liability of an executor *de son tort* as against the lawful executor, it seems that rightful acts of the executor *de son tort*—as *e. g.*, payment for delivery of goods in a due course of administration, if he be really acting as executor, and the party dealing with him has fair reason to suppose he has authority to act as such—will bind the property of the deceased (*Mountford* v *Gibson*, 4 East, 441; *Thompson* v *Harding*, 2 Ell. & B. 630).

One of the consequences of an executor *de son tort* being fixed with all the liabilities of an executor is that he is guilty of a *devastavit* by reason of misapplication of any of the assets of the deceased; but by the operation of that ancient maxim of our law, *actio personalis moritur cum personâ*, the liability, in this case, being in the nature of a tort, terminated (as it also did in the case of a rightful executor, at least, unless his own representatives, by becoming the personal representives of the original testator, continued the privity of contract) with the life of the wrong-doer. To remedy this it was enacted by Statute 30, Car. 2, c. 7, s. 2 (made perpetual and enlarged by 4 & 5 W. & M., c. 24, s. 12), that executors and administrators of executors of their own wrong, or administrators who have wasted or converted the assets of the deceased to their own use, shall be chargeable in the same manner as their testator or intestate would have been if living. Doubts have arisen on the preceding clause, whether it extended to executors and administrators of any executor of *right* who, for want of privity, were not answerable for debts due from their first testator or intestate, although such executor or administrator of right had been guilty of a *devastavit* or conversion, it was enacted by Statute 4 & 5 W. & M., c. 24, s. 12, that the executors and administrators of such executor or administrator of right who shall waste or convert to his own use the estate of his testator or intestate, shall be chargeable in the same manner as their testator or intestate would have been.

In pleading the liability of an executor *de son tort*, the same form must be observed as in the case of a rightful executor, because there is no other form in the register, and a long course of practice has given this the sanction of law (*Wood* v. *Kerry*, 2 Com. B. 515; the defendant, if he seek to take advantage of the fact, must show, by pleading, that the imputed character of executor, in the given case, was not lawfully assumed.

In cases where privity of contract is preserved by the chain of representation being duly continued, it is clearly shown by the case of *Wells* v. *Fydell* (10 East, 315) that a contract is enforceable against the executors of the executor of the contractor, without any averment of a *devastavit*, and that the liability cannot be successfully avoided by the defendant pleading merely that he has not any goods or chattels *of the original testator* in his hands to be administered, but he must also plead either that the first executor fully administered, or that he, the defendant, has no assets of the first executor out of which he can satisfy any *devastavit* committed by the first executor. "In such a case as this the plaintiff is entitled to recover his debt in either of two events: if the defendants have received assets of the first executor, and the first executor had received assets of *his* testator and not duly applied them." The form of a plea of *plene administravit* by an executor of an executor will be found in Bullen & Leake's Practice of Pleading, p. 580.

With regard to an executor *de son tort* of a rightful executor, in which case there is of course, no chain of representation, and therefor no privity of contract between the original testator and the executor *de son tort* it has, however been held that such an executor *de son tort* may be made answerable for the debts of the original testator upon the principle that the rightful executor must be taken to have possessed himself of all the assets of the original testator; and the defendant, the executor *de son tort*, being estopped from saying he is not the executor of the rightful executor, must be taken to have had the assets of the original testator, if any, which his executor left unadministered, transmitted to him; for the defendant, in his assumed character of executor, must be taken to have possessed himself of such assets of the original testator. But if in fact, as was said, "there were none such transmitted, and the executor of the original testator committed no *devastavit*, and the defendant have duly administered all the assets of the rightful executor, he will have a good defence to the action." "The plaintiffs ought not, if there be assets of the original testator, either independent of *or* in consequence of any *devastavit* of *his* executor, to be deprived of their remedy against those assets because no one thinks proper to take out administration *de bonis non* to the original testator; nor ought they to be driven to take out such administration themselves, when another person the (defendant) professing to be the executrix of the rightful executor, has possessed herself of those assets" (*Meyrick* v. *Anderson*, 14 Q. B. p. 272).

On the other hand, in the somewhat converse case of a rightful executor to an executor *de son tort*, it has been held in a recent case by the Court of Exchequer (*Wilson* v. *Hodgson*, 20 W. R. 438) that unless there be an averment of a *devastavit* by the executor *de son tort* so as to bring into play the before-mentioned statute of Car. 2, the rightful executor of an executor *de son tort* will not be liable to answer the contract of the original intestate or *quasi*-testator, and in such a case it will, it seems, be a sufficient

answer to plead, as was done in that case, that the defendants' testatrix was only an executrix *de son tort*, and that defendants had no notice that their testatrix had ever rendered herself liable to be charged, in the matter in question, as executrix *de son tort*. The action was on an agreement by the intestate or *quasi*-testator to take a house and furniture of plaintiff and to keep same in good repair and deliver same up; alleging entry on the premises after the death of the original contractor by the alleged executrix *de son tort*, and breaches, both by the original contractor and the executrix *de son tort*. The defendant, the rightful executor of the executrix *de son tort*, pleaded such a plea as above indicated, and it was held to be a good answer to the action; the *ratio decidendi* is indicated by the following passages in the judgment of Kelly, C.B.:—"The executor of an executor may be presumed to have assets until he has pleaded a plea of *plene administravit*. But the case of an executor *de son tort* is quite different. He has no power to possess himself of effects of the original testator, for to them the executor *de son tort* had no title. So that *primâ facie* there is no reason for saying that the executor of such an executor *de son tort* is liable for the debts of the original testator The statute 30 Car. 2 was passed to remedy the evil of the executor of such an executor not being liable for *devastavits*. But here *there was no allegation of a devastavit*, and as the statute did not apply, the defendant's plea that his testatrix was only executrix *de son tort* was good."—*Solicitor's Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Ross v. McLay.

Notice of trial before issue—Issue book, service of.

Held, following *Ginger* v. *Pycroft*, 5 D. & L. 554, that a notice of trial given before issue joined, except under Reg. Gen. Pr. No. 36, is irregular, and, following *McBean* v. *Duffy*, 4 P. R. 338, that the issue book must be delivered before or with the notice of trial.

[Chambers, May 13th, 1872.—*Mr. Dalton.*]

O'Brien obtained a summons to set aside the issue, issue book, and notice of trial on the grounds (1) that the notice of trial was given before issue joined and before plea pleaded, and (2) that it was given before the issue book was served. It appeared from the affidavits filed that cross-actions of libel were pending between these parties, in both of which the writs were issued on the 18th April, and the declaration filed on the 30th April, 1872. Tuesday, the 7th May, being the last day for pleading, the plaintiff in this case served a notice of trial for the Walkerton Assizes to commence on the 14th May; but defendant not pleading until the morning of Wednesday, May 8th, issue could not be joined, or the issue book made up until that day.

Luton (*Paterson, Bain & Paterson*) shewed cause:—The defendant's time for pleading expired on the 7th, which was also the last day on which notice of trial could be given for the Walkerton Assizes; and the delay in joining issue and serving the issue book was occasioned by his withholding his plea until the next morning. The Court will not suffer him to profit by his own wrong, or give effect to his subterfuge by setting aside the proceedings: *Farrell* v. *Fagan*, 11 Ir. L. Rep. 76. It has been decided that in such a case the plaintiff may give notice of trial at his own risk: *Lowry* v. *Robinson*, 11 Ir. L. Rep. 57; *Lindsay* v. *Dowling*, Ib. 59. As to the service of notice of trial before issue book, in *Carruthers* v. *Rykert et al.*, 7 U. C. L. J. 184, Chief Justice Robinson held that a notice of trial is not irregular, although the issue book is not delivered until the following day.

O'Brien, contra: — The defendant has been guilty of no subterfuge, for the declaration in each of the cross-actions having been filed on the same day, he could have gone to trial as well as the plaintiff, and it is exceedingly desirable that both these cases should be tried at the same time. The plaintiff, however, has proceeded under a mistaken notion as to the practice. Except under the circumstances mentioned in Reg. Gen. Pr. 36, notice of trial cannot be given before issue joined: *Ginger* v. *Pycroft*, 5 D. & L. 554. The rule of court does not apply here. The case of *Carruthers* v. *Rykert*, has been overruled by *McBean* v. *Duffy*, 4 P. R. 338, following *Reeves* v. *Eppes*, 16 C. P. 137; and the practice is now settled that the issue book should be delivered before or with the notice of trial. He referred also to *Riach et al.* v. *Hall*, 11 U. C. R. 356, and *Young et al.* v. *Laird*, 2 P. R. 16.

Mr. Dalton.—A perusal of the Irish cases which have been cited shews that the practice there differs materially from ours, which on this point is well settled. The defendant has taken no advantage to which he is not legally entitled. The only question for me is whether issue was joined before the notice was served. It appears it was not; and as the case does not come within the rule of court, I must make the order asked—costs to be costs to defendant in any event.

QUIETING TITLES ACT.

(Reported for the Canada Law Journal by Thomas Langton, M.A., *Student-at-Law.)*

Re Street.

Quieting Titles Act—Evidence of Possession and Deeds—Notice to persons in possession.

To complete the chain of the paper title to the land in respect to which a certificate of title was prayed production or proof of a power of attorney from the patentee to one Johnston was required. Search had been made for it without success. Its existence was not sworn to positively by the petitioner and the only evidence of it was an affidavit of one Page, who did not swear that he had ever seen it, and did not state his means of knowledge of its existence.

There were also some suspicious circumstances with regard to a deed executed apparently in pursuance of the power.

The only evidence as to possession was a statement in the

petitioner's affidavit that one Hicks, to whom the petitioner agreed to sell the land in 1866, was still in possession, and that possession had always accompanied the title.

No notice appeared to have been given to the person who was in possession.

No affidavit was put in as to adverse claims served upon the person directed to receive them.

The evidence as to possession and the existence of the power of attorney was *held* insufficient, and a certificate of title was refused until further evidence should be given to clear up the suspicious circumstances in the deed, said to be executed in pursuance of the power of attorney, and affording positive proof of the existence of the power, or else shewing the exercise of acts of ownership, which would justify the presumption that a conveyance of the legal estate had been made by the patentee.

Notice was directed to be given to the person in possession, and an affidavit as to adverse claims ordered to be furnished.

The facts sufficiently appear in the judgment.

Mr. Taylor, Inspector of Titles. The Master has certified that the petitioner is entitled to a certificate of title as prayed by his petition, but in my opinion the petitioner has wholly failed to show his right to such a certificate. It must be borne in mind that there is no evidence of possession except a statement on this petitioner's affidavit, that one Edward Hicks, to whom he, in 1866, agreed to sell the land, is in possession, and that possession has always accompanied the title under which he (the petitioner) claims. Whether there is now or has at any time been actual occupation of the land does not appear.

The paper title on which the petitioner relied was as follows: the Crown to Wm. B. Brown, Wm. Johnston to Josiah Page, and Josiah Page to the petitioner. No conveyance from Brown, the patentee, to Johnston is produced, indeed it is said there was none. Brown, it is said, sold to Johnston, and instead of a conveyance, gave him a power of attorney to sell and convey. In pursuance of this power, Johnston sold and conveyed to Page. The deed to Page is not, however, the deed of Brown at all. He is not once named in it; Johnston is the granting party. It is true the deed is executed by Johnston as attorney for Brown, but there are two suspicious circumstances apparent. The name of the patentee as given on the patent is "William B. Brown." The deed is signed, and so is the receipt for purchase money "Wm. W. Brown, William Johnston, attorney." Then it is quite evident both from the position of the words and also from the difference in colour of the ink that the words "Wm. W. Brown" "Attorney" were in both places written at a differerent time from the signature "William Johnston."

Then there is no evidence of Brown having ever given any power of attorney to Johnston, except Johnston's own evidence, and he does not swear positively to the fact. He only says that Brown "gave me to the best of my knowledge and belief, a power of attorney, &c." It is true in another paragraph of his affidavit he says the power of attorney under which he conveyed was valid, and of full legal effect, but no one except himself gave any evidence as to his power of attorney, or of ever having seen it. He and another person have searched among his papers and cannot find it. Page, the grantee, and another have also made vouchers, and have also been unable to find it. When I say there is no evidence of the power of attorney except Johnston's own, I exclude the affidavit of Page. He says Johnston bought from Brown, who instead of a conveyance gave him a power of attorney, and he believes it was in existence at the time Johnston conveyed to him, but this evidence is valueless. He does not say he ever saw the power of attorney, and he does not state his source of knowledge. He lives in another part of the country from both Brown and Johnston, and the transaction he is speaking of is one which took place before he had any connection with or interest in the property.

Perhaps the petitioner may be able to give such evidence of the purchase by Johnston from Brown to account for the difference of name—Wm. B. Brown and Wm. W. Brown, and to give such positive proof of the existence and due execution of the power of attorney as to establish a good equitable conveyance to Page of the patentee's estate in the land. He may also be able in addition to shew such possession, and the exercise of such acts of ownership, payment of taxes for a long series of years, &c., as would justify the court in assuming a conveyance of the legal estate to have been made, but in the absence of very clear and distinct evidence on those points, it is impossible for the petitioner to obtain a certificate of his title under the Act.

I may mention two more points. No notice appears to have been given to Hicks, who is in possession. If the petitioner should proceed further this would be essential. There it no affidavit from the person named in the advertisement as the person upon whom notice of claim is to be served, showing that no notice of any such claim has been received by him.

ASSESSMENT CASES.

(Before the Judge of the County Court of the County of Prince Edward.)

In the Matter of the Assessment of David Downey and others.

Assessment Act of 1869, (Ont.)—Time for service of notice of appeal.

The three days allowed for service of notice of appeal from assessment counts from the time of the decision of each case by the Court of Revision, and not from the day the court closes.

[Picton, June 13th, July 3rd, 1872.]

The appellants, on the 6th day of May last past, served the Municipal Clerk with notices of appeal from the decision of the Court of Revision, respecting the assessment of the above parties. The Clerk refused to receive the notices or consider them as filed in these cases, on the ground that they were served too late, as the Assessment Act of 1869, (Ontario,) required them to be served within three days after the decision of the Court of Revision; the Court of Revision held its first Session on the 25th day of April, 1872, adjourned until the following day; adjourned until and again met on the 29th of the same month, disposed of balance of cases on list, then adjourned until the 6th day of May last, upon which day the minutes of the previous session were approved and the roll confirmed.

Appellants considered the notices were served in proper time—that the three days commenced

from the day the Court of Revision confirmed the roll.

On June 13th the appeal was heard before His Honour, D. J. Macarow, Deputy Judge.

W. H. R. Allison, appeared for appellants.

Low, Q.C., *contra.*

The Clerk being sworn, admitted the service of the notice in this and all other cases above referred to on the 9th day of last May. He did not give the usual notices to the parties appealing, because he believed that they were not in time as all the cases were decided upon by the Court of Revision more than three days before the 6th of May. The minutes of the Court of Revision—as produced to the Court—shewed that the Court sat on the 25th, 26th and 29th days of last April and the 6th of last May, and the decision given in this and the other cases named were not disturbed or reconsidered before the Court closed its labors.

Low, Q. C., argued that the notices, in order to be properly served, should have been in the clerk's possession within three days after the day each case was decided, and not the day when the Court closed.

Allison, contra. the three days counted from the day the Court confirmed the Roll.

No authorities were cited.

His Honor said that as the points raised were of serious importance, he would adjourn the Court to consider the matter, and to ascertain if any decision had been given by other County Court Judges on the points raised in this case.

3rd July.—Macarow, D. J.—I have ascertained from the Judge of the County Court of the County of Simcoe (Judge Gowan), that it is his opinion that the three days should be counted from the day the decision is actually given in each case, and not from the day the Court of Revision closed.

I am of opinion that the three days must be counted from the time the decision is given. I am glad to find this view confirmed by the opinion of Judge Gowan—for whom I have a very high respect—and in this view I have no alternative but to administer the law as I find it.

My decision is, that the time for the notice counts from the time of the particular decision, and not from the day of the close of the Court of Revision, as contended for by *Mr. Allison* and I dismiss this and the other cases without costs.

ENGLISH REPORTS.

CROWN CASES RESERVED.

Reg. v. Payne.

Evidence—Joint charge—Incompetency of fellow prisoners as witnesses for one another.

After several prisoners jointly indicted are given in charge to the jury, one, while in such charge, cannot be called as a witness for another.

The 14 & 15 Vict., ch. 99, does not apply to criminal proceedings.

[C. C. R., Jan. 27, 1872. 26 L. T., N. S., 42.]

Case reserved by Keating, J., for the opinion of the Court for the Consideration of Crown Cases Reserved, and directed by that Court to be argued before all the Judges.

John Payne, George Owen, Isaac Owen, and Joseph Curtis, were indicted before me at the Winter Assizes for the County of Worcester, 1871, for that they to the number of three or more, armed with offensive weapons by night, did enter in, and were on land belonging to Earl Dudley, for the purpose of taking or destroying game.

It appeared that at one o'clock on the morning of the 4th October, 1871, the keepers of Earl Dudley discovered a number of poachers upon the Earl's lands taking game. They were armed with stones, bludgeons, &c, and advanced upon the keepers, with whom they had a desperate struggle. Ultimately the keepers were forced to retire, one keeper being dangerously and another severely wounded.

The prisoner Payne and the two Owens were first apprehended, and on being brought before the magistrates each set up an *alibi* by way of defence, and called witnesses in support. Amongst the witnesses called by Payne was the prisoner Curtis, not then in custody, and he proved having been with Payne at the time in question at a place so distant from the scene of the affray, as to render it impossible he could have been one of the poachers. Curtis with the other witnesses for the prisoners, were bound over by the magistrates, under 30 & 31 Vict., c. 35; but having been afterwards identified as one of the party of poachers he was committed, and indicted with the other three prisoners.

On the trial all four prisoners were sworn to, by various witnesses, as having formed part of the gang of poachers on the night in question. The defence by each was, as before the magistrate, an *alibi*, and the counsel for Payne proposed to call the prisoner Curtis to prove what he had deposed to before the justices. I held that he was incompetent, and could not be called. All the prisoners were convicted and sentence passed.

I desire the opinion of the Court of Crown Cases Reserved, first, whether a prisoner jointly indicted with another can, after they have been given in charge to the jury, be called as a witness for the other without having been either acquitted or convicted, or a *nolle prosequi* entered: *Winsor v. The Queen*, 35 L. J. 161, M. C.; 14 L. T. Rep. N. S. 195; *Reg. v. Deeley*, 11 Cox C. C. 607. Secondly, whether upon the present form of indictment, and under the circumstances of the case, the prisoner Curtis was competent, and ought to have been called as a witness for the prisoner Payne: (See Russell on Crimes, by Greaves, 626–7, 4th edit.; Taylor on Evidence, 1178–9.)

If the prisoner Curtis was a competent witness, and might have been called on behalf of Payne in the present case, then the conviction is to be quashed or the prisoner to be discharged, otherwise the judgment is to stand.

H. S. Keating.

T. S. Pritchard (*E. H. Selfe* with him) for the prisoner.—The question mainly depends on the construction of the 14 & 15 Vict., c. 99, s. 8. Sec. 1 of that Act repeals so much of the 6 and 7 Vic., c 85, as provides that that Act shall not

render competent any party to any suit, action, or proceeding individually named in the record, &c. Then sec. 2 enacts, that on the trial of any issue joined, or of any matter or question, or on an inquiry arising in any suit, action, or other proceeding in any court of justice, &c., the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall except as hereinafter excepted, be compelled and compellable to give evidence. And then sec. 3 provides that nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. Now, under the 1st section the prisoner Curtis was a competent witness for the prisoner Payne, and there is nothing in the 3rd section which prevents him from being a witness. Since that Act in *Reg.* v. *Deeley*, 11 Cox, C. C. 607, where three prisoners were jointly indicted for robbery with violence, and were given in charge to the jury, Mellor, J., allowed two of the prisoners to be called as witnesses for the other one. And in a case at the Shropshire Assizes, Pigott, B., also allowed one prisoner to be called as a witness for another on a joint indictment after they were given in charge to the jury. The same course has also been followed by Lush, J. The reason for the incompetency was the ground of interest, and not of being a party to the suit or proceeding: 1 Phil. on Ev. 68, 8th edit. In *Worrall* v. *Jones*, 7 Bing, 395, Tindal, C. J., says that a party to the record would be an admissible witness if he were not interested. [Martin, B.—Suppose two persons jointly indicted for murder, what legal interest has one in the conviction or acquittal of the other? Was not the rule that parties to the proceeding were excluded? Bramwell, B.—If it was on the ground of interest, that was an objection for the benefit of the party interested which might be waived and the party called, but did anyone ever hear of such a thing being done?] It may be that the rule is qualified to the extent that a party to the immediate inquiry is not admissible. [Blackburn, J.—If a prisoner is competent to give evidence for a fellow prisoner, on cross-examination he may be forced to give evidence against himself.] He would be privileged from answering questions tending to criminate himself. In Taylor on Evidence, 1096, it is said that the 14 & 15 Vict., c. 99, which was intended to remove a doubt, has instead created one by the words "Except as hereinafter is excepted" in section 2. [Bramwell, B.—My brother, Cleasby, B., suggests that that exception points to section 4. Is not the rule of construction, that where the Crown is not referred to in Acts of Parliament they do not apply to the Crown, for the Crown is the prosecutor? Cockburn, C. J.—The words "other proceeding" in the statute must be construed as *ejusdem generis* with the words preceding "suit, action," and would mean other civil proceeding. The exception in the proviso was introduced (probably in committee) *ex abundanti cautelâ*, and was not intended to enlarge the enactment.] The words of section 2 are, "any suit, action, or other proceeding in any court of justice, or before any person," &c.; and then, section 3 goes beyond civil proceedings. The learned counsel then referred to 1 Russell on Crimes, 625. In *Reg.* v. *Smith*, 1 Moo., C. C., 289, the wife of one prisoner was held inadmissible to prove an *alibi* for another prisoner with whom her husband was jointly indicted, on the ground that by shaking the evidence of a witness who had identified both prisoners, she would weaken the case against her husband. But in *Reg.* v. *Moore*, 1 Cox, C. C. 59, Maule, J., said, of course a wife could not be examined for her husband, but for another prisoner jointly indicted with him for a burglary she might, and admitted her as a witness. And Wightman, J., so held in *Reg.* v. *Bartlett*, 1 Cox, C. C. 105. The modern legislation encourages the calling of witnesses for prisoners; and to facilitate this the 30 & 31 Vict., c. 35, s. 3, provides for their being bound over, and section 5 for the allowance of their expenses. It would be a dangerous rule to exclude co-prisoners as witnesses, as evidence might be shut out by vindictive persons procuring their commital as accomplices. [Cockburn, C. J.—This danger may be obviated by asking permission to have the prisoners tried separately; and then there would be no objection to calling one prisoner as a witness for another with whom he was jointly indicted.] It ought to be a matter of right for a prisoner to be enabled to call a joint co-prisoner as a witness. The giving of the prisoners in charge ought not to raise any difficulty, for the issue is joined when the prisoners plead: *Reg.* v. *Winsor*, 35 L. J. 121, M. C.; 10 Cox, C. C. 270. [Blackburn, J. — The material thing is when the prisoners are given in charge to a jury who are to say whether they are guilty or not guilty. They are the persons who are to determine the issue as well as to hear the evidence. If one prisoner is admissible for another, he must also be admissible against him. The competency of one prisoner as a witness for another is one thing—the privilege not to answer questions tending to criminate himself is another. The refusal to answer only goes to the credit of the witness. Taylor on Evidence, 627 (note), and *Reg.* v. *Jackson* and *Cracknell*, 6 Cox C. C. 525, were then referred to.

Streeten (*Jelf* with him) for the prosecution.—The witness was properly rejected. In *Hawksworth* v. *Showler*, 12 M. & W. 47, Lord Abinger says: "Nothing is clearer than this, that a person cannot be a witness who is a party to the record, and affected by the determination of the issue, and that the wife of such a person is equally incapable of being a witness." And Alderson, B., said, "The rule is, that a party upon the record against whom the jury have to pronounce a verdict, cannot be a witness before that verdict is pronounced." The modern statutes have not altered that principle. The 14 and 15 Vict., c. 99, only applies to civil proceedings; and sect. 8 was introduced, lest it should

otherwise be thought to extend to criminal proceedings. If Curtis had been allowed to be called as a witness, every word that he said must have been in his own favour as well as in favour of Payne. If a co-prisoner is admissible at all, his fellow-prisoner or the prosecutor may compel him to be a witness. [Lush, J.—If he was allowed to be called, he must be cross-examined, and if he declines to answer on the ground that his answers would tend to criminate him, that might have the effect of leading to his conviction. Cockburn, C. J.—Or he might be cross-examined as to his past life, and the result might seriously injure his case. Brett, J.—Is it not a fundamental rule of the law of England that when a prisoner is on his trial, he shall not be examined or cross-examined for or against himself?]

Pritchard in reply, cited *Reg.* v. *Stewart*, 1 Cox, C. C. 174.

Cockburn, C. J.—We are all of opinion that the witness was properly rejected at the trial; and we all agree that the proviso in the 14 & 15 Vict., c. 99, on which the prisoners' counsel relied, was only intended to prevent the statute being supposed to contradict or alter the rule of law as it has existed from the earliest times, according to which rule a party on his trial could not be examined or cross-examined as a witness for or against himself. It is impossible that the Legislature could have intended by such a proviso to do so. And the old law of England in that respect still remains unaltered.

Conviction affirmed.

EXCHEQUER CHAMBER.

The Queen v. Reeve and Hancock.

Evidence—Admissibility of confession.

The prisoners, two children of about eight years of age, having been apprehended on a charge of misdemeanour, the mother of one of the prisoners, in presence of a policeman, and of the mother of the other prisoner, said, "You had better, as good boys, tell the truth." Thereupon both prisoners confessed.

Held, that the confession was admissible against the prisoners on their trial.

[20 W. R. 631.]

Case stated by Byles, J.

The prisoners were children. One was eight years of age and the other a little older. They were convicted at the Worcester Assizes of an attempt to commit a misdemeanour by obstructing a railway train.

The evidence was that Hancock's mother, Reeve's mother, and a policeman being present after they had been apprehended on suspicion, Mrs. Hancock said, "You had better, as good boys, tell the truth," whereupon both the prisoners confessed, and on this confession were both convicted.

The question for the Court of Criminal Appeal is whether the confession was admissible against both the prisoners or either.

No counsel appeared for the prisoners.

Streeten, for the prosecution contended that the words used by the mother of the prisoner Hancock were nothing more than an exhortation to the prisoners to be good boys and tell the truth, that they amounted only to moral suasion, and contained no promise of favour or menace which could operate as an inducement to the prisoners to confess, and so render inadmissible what was subsequently said by them. He cited *Reg.* v. *Jarvis*, L. R. 1 C. C. R. 96, 16 W. R. 111.

Kelly, C. B.—I am of opinion that this conviction must be affirmed. The cases have already gone quite far enough for the protection of guilt, and the doctrine of the inadmissibility of confessions ought not, I think, to be extended. The last authority upon the subject, *Reg.* v. *Jarvis*, (*ubi sup.*) May act as a guide to us on the present occasion, and there the inducement to the prisoners to confess was certainly stronger than it was here, where the words used were such as any mother might very properly say to her son in similar circumstances. The confession which was made by the prisoners was, I think, strictly admissible against them.

Willes, J., Cleasby, B., Grove, and Quain, JJ., concurred.

QUEEN'S BENCH.

Richards v. Gallatly.

*Practice—Inspection—*14 & 15 *Vic.* 99, *s* 6.

Action by a passenger against the agents of a ship for fraudulently misrepresenting her condition in consequence of which he quitted her and took his passage on in another vessel.

Inspection was refused to the plaintiff of letters written to the defendant by other passengers who left the ship at the same time as he did, and also of letters written by the captain and the owner to the defendants *post litem motam*.

[20 W. R. 630.]

The first count of the declaration was on a contract by the defendants to provide the plaintiff with a passage in a ship called the *Ferdinand de Lesseps* from London to Madras; that the ship was tight, staunch, &c., sufficiently equipped for the voyage, appropriate for the conveyance of passengers, and capable of steaming throughout the entire voyage. Breach, that she was not tight, staunch, &c.

The second count was on a fraudulent representation that the ship was about to undertake her first voyage, that she was good and substantial, fit to perform the voyage in an efficient manner, and capable of steaming throughout the entire voyage; whereby the defendants induced the plaintiff to take his passage.

The date of the writ was the 28th of June, 1871, and issue was joined on the 10th of August following.

Martin, B., made an order for the defendants to answer interrogatories, and the affidavits disclosed the following facts:—

The *Ferdinand de Lesseps* was owned by a Mr. Lambie, of Glasgow, and the defendants, with whom the plaintiff effected the contract for his passage, were shipbrokers and agents for Lambie. The plaintiff embarked at Gravesend on the 16th of December, 1870, and finding much fault with the ship and her accommodation, disembarked with other passengers at Cowes, on the 21st of the same month, and took his passage on in another vessel. In a schedule annexed to the affidavit was set out a list of documents in the defendants' possession, including letters

from other passengers by the same ship to the defendants, a letter of the 13th of February, 1871, from the captain of the ship to the defendants, and a letter of the same date from Lambie, the owner, to the defendants.

A summons was then taken out for inspection of these documents, and Cleasby B., granted inspection of all of them, "except letters of other passengers, and letters of the captain and owner subsequent to the 21st of December, 1870, without prejudice to application to court in respect of letters of other passengers."

Murphy moved for a rule to vary the above order, by adding leave to inspect the documents which Cleasby, B., had excluded from his order.

Willes, J.—I see no ground for interfering with respect to the letters of other passengers to the defendants, which have nothing to do with the contract between the plaintiff and the defendants and which are not shown to relate to some common matter in dispute between all the parties. The letters from the captain and from the owner to the defendants are after litigation, and fall within *Woolly* v. *The North London Railway Co.*, 17 W. R. 797, L. R. 4 C. P. 602.

Byles, J.—I am of the same opinion. The letters which were written after the commencement of the action or *post litam motam* are clearly not admissible; nor are the letters from other passengers who were claiming compensation from the defendants.

Brett, J.—It is not suggested that the passengers' letters could be admissible on the first count of the declaration, but it is said that they are admissible under the count for fraudulent misrepresentation. The plaintiff will have to make out that the representations were false to the knowledge of the defendants when made; and can it be said that the letters of other passengers complaining of the state of the ship are admissible to prove that? They never could be put in evidence by the plaintiff to prove any one thing he has to prove: and if they are wanted to cross-examine the defendants on, that is not an orthodox purpose for inspection. I can, however, see an unworthy purpose for which these letters might be wanted, viz., for prejudice, to infer the defendants' consciousness of guilt from their paying claims made upon them, whereas, in fact, they may have paid merely because the claims were small. The other letters were written after the dispute had arisen, and were from the captain and from the owner, and would clearly not be written in the ordinary course. They therefore fall within the cases in which communications made to railway companies by their servants have been held privileged.

Rule refused.

CHANCERY.

Lancefield v. Iggulden.

Practice—Evidence—Affidavits—Cross-examination of plaintiff—Subsequent affidavits.

Affidavits filed by the defendant subsequently to the cross-examination of the plaintiff, are under certain circumstances allowed, but the plaintiff must also be allowed to file fresh affidavits to meet them.

[20 W. R. 621.]

This was an application adjourned from chambers on the part of the plaintiff to prevent the defendants from using against him the affidavits filed by them subsequently to his cross-examination. The chief clerk had allowed such a course of proceeding.

Collins, for the plaintiff, cited *Mayes* v. *Mayes*, 14 W. R. 169.

Yate Lee, for the defendants.—15 and 16 Vic. c. 86, s. 40; Consol. Order, xxxv. Rule 40; Order 1865, Rule 7. As to the discretion of the Court, *Besemere* v! *Besemeres*, 2 W. R. 124, 1 Kay, App. 17; *Morey* v. *Vandenburg*, 14 L. T. N. S. 542. *Mayes* v. *Mayes*, is neither law nor practice.

Collins, in reply.

Bacon, V. C.—*Mayes* v. *Mayes*, is a binding authority. An investigation in chambers is like a trial at law, the defendants have to meet the evidence of the plaintiff. In this instance the defendants did not file their affidavits before cross-examining the plaintiff, which they should have done. The plaintiff must have an opportunity now of filing fresh affidavits, but the defendants also will have a right to reply by affidavits notwithstanding cross-examination.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Adam Dietrich v. Pennsylvania A. R. R. Co.

1. A railroad ticket "good for one seat from Philadelphia to Pittsburgh" entitles the holder to one continuous passage from Philadelphia to Pittsburgh in the train into which he enters to be carried, and not by train after train and by broken stage day after day.
2. If the passenger chooses voluntarily to leave the train before reaching his destination, he forfeits all his rights under the contract.
3. One who buys a ticket is bound to inform himself of the rules and regulations of the company in running its trains.

Having left the train in which he started, the fact that he subsequently entered another train and travelled over a portion of the route without being required to pay fare by the conductor in charge of the train, will not prejudice the company or renew the contract.

Error to the Court of Common Pleas of Lancaster County.

May Term, 1872.

Opinion of the Court by Agnew, J.

This was a judgment of non suit, and the question is, whether the plaintiff's evidence disclosed a case for the jury. Dietrich, the plaintiff, was a drover, residing in Lancaster County. On the 11th of March, 1867, he purchased a drover's ticket from Philadelphia to Pittsburgh, and took passage on the fast line on the defendant's railroad. At Lancaster he got off, and next day (the 12th,) he resumed his journey. When the conductor, Young, came along collecting fares, he declined the plaintiff's ticket on the ground that he had "stopped off," and informed him that such were his orders. Young told him he must get off at Landisville, after passing Landisville, finding him still on the train, Young told him he *must* get off at Mount Joy. At Mount Joy the brakesman put him off, but Young, who observed the brakesman taking him across the track, halloed to him not to put him off in that way; and told Dietrich to get on again. He was then carried to Altoona,

where Young's portion of the route ended. After leaving Altoona, Hankins, the conductor from Altoona to Pittsburgh, came around, and the plaintiff exhibited his drover's ticket. Hankins refused it, and put him off at Gatlitzin, at the next end of the mountain tunnel. The plaintiff got on without leave, and Hankins again refused his ticket, the plaintiff paid his fare from Altoona to Pittsburgh.

On his cross-examination, the plaintiff stated that Hankins was not rude or unkind, and told him it was his duty to collect the fare or put him off. Dietrich said to him, I want this tested and I want you to put me off gently. The question is, therefore, simply upon a breach of the contract for carriage, and depends on its terms. Before examining the terms of the ticket, it is proper to clear the case of some immaterial matters. Stress is laid on the statement of Wimer, that the restriction as to stopping off was not intended for such men as he, who shipped stock over the road every week. This clearly has no influence whatever, in ascertaining or interpreting the terms of the ticket he afterwards purchased from the proper ticket agent. Wimer was a mere freight agent, whose duty had no relation to the sale of tickets, but was confined to giving the required certificate to entitle Dietrich to a drover's ticket. When Dietrich went to Franciscus, and asked him to make the ticket so as to stop off at Lancaster, Franciscus said, "No, sir." He admits that he knew of the restriction as to stopping off, which his request implies, and that he had seen Young refuse another drover's ticket for this cause, and that in consequence he had been in the habit of buying a ticket from Philadelphia to Lancaster, when he wished to stop off. The restriction, and his knowledge of it, if this were necessary, are plainly proved by himself. It is evident therefore, that the plaintiff is thrown upon his ticket and the terms it imports or recognizes, as the evidence of his right of transit over the defendant's road. The ticket is in these words: "Drover's ticket. Not good on the Philadelphia Express. Good only in the hands of Mr. A. Dietrich for one seat from Philadelphia to Pittsburgh. This ticket good only until March 16th, 1867. Issued March 11th, 1867. S. H. Wallace, Agent." On the back is stamped Penn'a R. R., March 11th, 1867, Philadelphia. Such tickets are evidence of the payment of the fare, and of the right of the holder or party named, as here, to be carried according to its terms. So far as they are expressed the terms are binding of course, but such tickets are not the whole contract, which must be gathered, so far as not expressed, from the rules and regulations of the company in running its trains. This is the generally received doctrine; with the qualification, however, that these rules and regulations must be reasonable and not contrary to the terms expressed. See *Johnson* v. *The Concord R. R. Co.*, 46 New Hampshire Rep. 312 and cases there cited. *The State* v. *Overton*, 4 Zabriskie, 435. *The Clev. Col. & Cin. R. R. Co.* v. *S. H. Bartram*, 11 Ohio St. Rep. 457. *Chenney* v. *The Boston & Maine R. R. Co.*, 71 Metcalf, 121. With the same qualifications of reasonableness it is also well settled that one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. Thus he must ascertain the train in which he is to go, the time of its departure and arrival, its stopping stations, his right to get off and get on, to resume his trips, &c. See the cases *supra*. If the law were otherwise a railroad company could not regulate the running of its trains to suit the interests of the public or of themselves. For this purpose some trains must be fast with few stoppages, others must be slow with frequent stoppages, some must be through trains and others local. It is very clear that a passenger with a through ticket cannot require a local train to carry him through. Nor can he require a through train to stop at a way station not in its time-table. His even having a stop-off ticket would not increase his right to require the train to stop at a station not in its time-table.

It is evident that if in such cases the holders of tickets can compel the trains to alter regulations, they would be governed by the passengers, and not by the company. An excursion party on this principle, stopping off at will, would overcrowd a subsequent train to the discomfort of the proper passengers, and to the prejudice of the interests of the company. The authorities, as well as the reason of the thing, shews that the company must make its own regulations, and that passengers purchase their tickets subject to these reasonable rules, and that it does not lie on the company to bring home notice of them in order to establish the terms of the contract of carriage. In this case the testimony of the plaintiff himself clearly shows that his ticket did not entitle him to stop off at Lancaster, and if notice were necessary that he knew that fact. This brings us now to the question, whether the face of the ticket, by its terms imports a right to stop off. The first noticeable and very obvious thing is, that the terms on the face of the ticket are very restrictive. It is expressed to be a "Drover's ticket.". It cannot be used by any other than a drover. Then it is not good on the Philadelphia Express; it is "good only in the hands of Mr. A. Dietrich;" no one else can use it—then, "this ticket is good *only* until March 16th, 1867." It is therefore not good after that day. It is restrictive from the beginning to the end, and is wholly unlike a general ticket, which any holder may use, within any reasonable time; and yet even as to such tickets the authorities are clear—the right to stop off at intermediate un-named points does not exist unless by means of stop-off tickets, or the customary rules of passage. The express terms of a drover's ticket being all restrictive without exception, it gives no countenance to an implied right to stop off. The reason is obvious also—the ticket is sold at less than half price—that is, this was for five dollars instead of eleven. Its purpose is special, and the restriction in time (until the 16th of March) was to prevent abuse of the benefit intended to be conferred on a particular class of persons. With all these restrictions on the face of the ticket, and in full view of the purpose of the ticket, it is obviously impossible to interpret the words, "good *only* until March 16th," into an enlargement of the contract, so that it shall read, contrary to the regulation of the company,

"good to travel every day, from day to day, from the 11th to the 16th of March, by as many trains from and to every station at which the trains stop, and by as many stages as A. Dietrich may elect to make." Then when we come to the marrow of the ticket, to wit: Good for "*one* seat from Philadelphia to Pittsburgh," it does not change the purpose and the restrictive character of it. There is nothing in the words "*one* seat" which enlarges the meaning so that the holder may take seat after seat, train after train, day after day, and from station to station, especially in contravention of the known regulations of the company as to the travel on such tickets. It necessarily follows that the contract for "*one* seat from Philadelphia to Pittsburgh" must mean in the train which the holder of the ticket enters to be carried, and not by train after train, and by broken stage day after day. That this is the true interpretation of the contract is decided in *State* v. *Overton*, 4 Zabriskie, 438; *Cl. Col. & Cin. R. R.* v. *Bartram*, 11 Ohio St. Rep. 462; *Johnson* v. *Con. R. R. Co.*, 46 N. H. 213, and *Chenney* v. *Bos. & M. R. R. Co.*, 11 Metcalf, 121: Angell on Carriers, Ed. 1808, § 609. No cases are cited to the contrary, and we remember none The language of C. J. Green, on this point, in *State* v. *Overton* is so much to the purpose we quote it. "The question (he says) is obviously a question of contract between the passenger and the company. By paying for passage and procuring a ticket from Newark to Morristown, the passenger acquired the right to be carried directly from one point to the other without interruption. He acquired no right to be transported from one point to another upon the route at different times and by different lines of conveyance, until the entire journey was accomplished. The company engaged to carry the passenger over the entire road for a stipulated price. But it was no part of the contract that they would suffer him to leave the train and resume his seat in another train at any intervening point upon the road." "If the passenger chose voluntarily to leave the train before reaching his destination he forfeited all rights under his contract. The company did not engage and were not bound to carry him in any other train, or at any other time over the residue of the route." This is the clear legal effect of the contract between the company and the passenger in the absence of any evidence to the contrary. If the passenger insists that under his contract, by virtue of general usage, or the custom of the road, he is entitled to be carried at his pleasure, either by one or different trains, the burthen of proof was upon the State. That is to lay on a passenger, the case being an indictment against a conductor for a battery in putting off a passenger unlawfully. In adopting this language of the learned Ch. Justice of New Jersey, we should not omit to guard our meaning, by saying there may be exceptions, where from misfortune or accident, without his fault, the transit of a passenger is interrupted, and where he may resume his journey afterwards. In the present case the ticket of Dietrich gave him no right to stop off, and the company, when he took his seat in the train at Philadelphia, having entered upon the performances of its contracts, had a right to continue its execution without interruption. Another reason is that fare covers the ordinary luggage of the passenger, entitling it to be checked through to the point of destination. But if the passenger may stop off he may demand his baggage at each stoppage, or if it go on he will not be at the end of the journey to receive it. The contract was therefore broken by Dietrich himself when he stopped at Lancaster without permission. When he came upon the train the next day, he began a new journey, and on refusing to pay his fare he became a trespasser, and was rightfully put off at Mount Joy. But it is argued that as he was permitted by Young to re-enter the train and was carried to Altoona he acquired a right to be carried to Pittsburgh. This is erroneous. When Dietrich stopped at Lancaster his right of transportation under his ticket ended, as we have seen. Consequently, when he began a new passage the next day he was bound to pay his fare. He knew this, and that he was put of at Mount Joy because he would not pay it. Therefore Young, as conductor, being bound by the rules of the company, not only had no authority, but acted against his orders in permitting him to return upon the train without payment of his fare. The ticket having lost its title to be recognized, all that Young did thereafter was unauthorized, and the plaintiff knew this. Clearly no title to be carried through to Pittsburgh could be acquired by Young re-offering him to ride without payment of his fare. Young could not carry him, and could not by his omission to collect the fare, send him forward without payment of any. His violation of duty in carrying a passenger without payment of fare clearly could not bind his successor upon the remainder of the route. It is very clear that when Hankins took his place on the train, between Altoona and Pittsburgh, it was not only his right, but his duty to demand the fare between those places. He found Dietrich without a ticket imparting a right of passage and without any evidence of payment of the fare. The fact that the company had lost the fare from Lancaster to Altoona, by Young's violation of duty, conferred no right of further transportation, while Dietrich, at every step afterwards, was travelling without right, and with full notice that he was doing so. As remarked in *Beebe* v. *Ayres*, 28 Barbour, 278; the conduct of one conductor in violating the rules of his employers could not prejudice another employee, more faithful than himself, who has adhered to his instructions and discharged his duties under them.

The judgment of the court below is therefore affirmed.

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DIARY FOR SEPTEMBER.

1. SUN.. *14th Sunday after Trinity.*
8. SUN.. *15th Sunday after Trinity.*
15. SUN.. *16th Sunday after Trinity.*
21. Sat. .. *St. Matthew.*
22. SUN.. *17th Sunday after Trinity.*
29. SUN.. *18th Sunday after Trinity.*

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Canada Law Journal.

SEPTEMBER, 1872.

The Right Honourable Sir Barnes Peacock, late Chief Justice of the High Court of Calcutta, was appointed in June last a member of the Judicial Committee of the Privy Council, with a salary of £5,000 a year. Sir Jas. W. Colville, one of his colleagues on the Judicial Committee, is also a retired Chief Justice of the same Indian Court.

Mr. Baron Hughes, one of the judges of the Irish Exchequer, died last July. It is said that his successor will be the present Attorney-General for Ireland, the Right Honourable Richard Dowse, M.P.

In noticing the death of Matthew Davenport Hill, Q.C.,—the senior in the list of Queen's Counsel—the *Law Magazine* and the *Solicitors' Journal* advert to the fact, that in 1838 he won general respect and admiration by his gratuitous defence of twelve men, who had been condemned to transportation by a Canadian Court for political offences in Canada and who were brought to London on a writ of *habeas corpus*, obtained on the ground of an illegal conviction. He succeeded in getting the conviction quashed as to one half the number.

Chief Justice Bovill, who has earned the reputation of being singularly infelicitous in his remarks, when he gives his mind to it, lately adverted to the judgment of the Privy Council in the *Bennett* case, in the following manner—when acknowledging the toast of Her Majesty's judges, at a dinner given by the "Solicitors' Benevolent Association"—"As it was said in former days, that a prisoner had been acquitted, but desired not to do it again, so the Privy Council had in a most elaborate judgment, pronounced a gentleman to be not guilty, at the same time telling him to take warning for the future." He hoped the judgment would at least have the advantage of satisfying both sides—a result which perhaps some day, from the fusion of law and equity, might be attained in all cases, so that both parties to a cause might retire equally well pleased.

The Court of Queen's Bench, in England, recently struck an attorney off the rolls, because of his personating an articled clerk at an examination of the Law Society. It appeared that the candidate was very nervous, and felt himself unequal to undergo the examination, and in an unhappy moment, his friend appeared for him. The Court proceeded upon grounds of public policy.

It has lately been held in the English Court of Bankruptcy, by one registrar sitting as chief judge in an appeal from another registrar, that a liquidation by arrangement cannot be sanctioned by the court in a case where the debtor was without assets. It appears from the judgment, that the point was not argued; no cases are referred to, and the matter is disposed of by a broad declaration that it was clear to the mind of the registrar that the Legislature never intended that a debtor, who has not a single farthing for his creditors, should avail himself of the provisions of the bankruptcy law. The practice is stigmatised as an ingenious device to revive a most obnoxious practice under the old law, that of white-washing, and ought to receive no countenance from the court: *Ex parte Ash*, 16 Sol. J. 574. The *Revue Critique* lately discussed this question under the Dominion Statute, and came to an opposite conclusion. The law has been settled in this Province, in a case not cited in the *Revue* (*Re Thomas*, 15 Gr. 196) that the want of assets is no reason why the case should not fall within the scope of the Act.

A gift for life of consumable articles with a limitation over, in a testamentary instrument, is usually held to vest in the donee the absolute ownership. There have been conflicting decisions as to the effect of such a gift in the case of farm-stock. But lately the Master of the Rolls has held (in *Cockayne* v. *Harrison*, 20 W. R. 504) 8 C. L. J. N. S. 219, that the subject of such a bequest being in the nature of stock-in-trade, only a life-interest passed as to so much of the stock as was of a consumable nature, and that the gift over was operative.

Our readers will have noticed in the *resumé* of the proceedings in Convocation in Easter Term, published in our last issue, that various important changes have been made in the system of law reporting at Osgoode Hall. The intention is to follow the system recently adopted in England. We see some practical difficulties in the way and some imperfections, which may, however, be remedied. The changes will work harshly as to some of the reporters. We shall refer to the whole matter at greater length on a future occasion.

"CAUSE OF ACTION" IN THE COMMON LAW PROCEDURE ACT.

Mr. Harrison in his commentary upon the 44th section of the Common Law Procedure Act (as Consolidated), remarks that much difficulty has arisen about the meaning of the words "Cause of action" contained in that section. The difficulty has, of late, been much increased by the various conflicting decisions of the English Courts upon the corresponding sections of their statute, *i.e.*, the 18th and 19th of the C. L. P. Act of 1852. The result of this conflict is briefly this: the English Common Pleas holds that the statute includes a case where the whole cause of action, technically speaking, has not arisen within the jurisdiction, but where such an act has been done on the part of the defendant, as in popular parlance, gives the plaintiff his cause of complaint. The Queen's Bench holds precisely the opposite of this, namely, that the *whole* cause of action and not merely the act or omission which *completes* the cause of action, must arise within the jurisdiction, in order that the language of the statute may be fully met. The Exchequer has occupied a somewhat intermediate position, and some of its decisions have been, so to speak, of an uncertain sound. Thus *Fife* v. *Round*, 30 L. T. R. 291, is in accord with the holding of the Common Pleas, while the later case of *Sichel* v. *Borch*, 2 H. & C. 954, agrees with the view of the Queen's Bench—though it is to be observed that the court does not advert to its former contrary decision. In the last-reported case in the Exchequer, *Denham* v. *Spence*, L. R. 6 Exch. 46, a majority of the judges adopted the views of the Court of Common Pleas, as expounded in *Jackson* v. *Spittall*, L. R. 5 C. P. 542, and held that the "cause of action" referred merely to the act or omission constituting the violation of duty complained of, and creating the necessity for commencing the action: Kelly, C.B., strongly dissented and upheld the interpretation given

to the words by the Queen's Bench. Subsequent to *Denham* v. *Spence*, the only other case reported is that of *Cherry* v. *Thompson*, (in the Queen's Bench) 26 L.T.N.S. 791, where all the judges—Cockburn, C.J., Blackburn, Lush and Quain, J.J.—unanimously affirm the construction put by their court upon the statute.

Thus the practice stands in about as great confusion as once obtained upon the question of security for costs, in cases where foreigners within the jurisdiction were suing in the English Courts—a subject lately discussed in this journal. With colonial deference for English precedents, it will be rather a nice matter for our judges now to say what court or what practice they will follow. We have no reported decisions on the section in question, but the practice, as we understand, has always been in Ontario to hold that it must be shown that the whole cause of action arose within the Province. But suppose a case now to be brought before the judges in term—how would they decide? Follow the holding of the Queen's Bench, as has often been done in matters of practice, where the English Courts were at variance? (Per Robinson, C.J., in *Gill* v. *Hedgson*, 1 Prac. R. 381). Or, hold that the decisions of the Common Pleas, *plus* the later decisions of the Exchequer, outweigh those of the Bench? It seems to us that the true way out of the quandary is the eminently sensible course adopted by Mr. Justice Wilson, in *Hawkins* v. *Paterson*, 3 P. R. 264, where he says, "I am not prepared to adopt as a rule that we are to follow the decisions of the Queen's Bench, in England, more than those of the other courts. * * I think we should exercise our own judgment as to which is the best rule and practice to adopt, if there be a difference in the English Courts, and adopt that which will be the most convenient and suitable for ourselves, whether it shall be the decision of the one court or the other."

In that case the learned judge gave effect to the practice of the Courts of Common Pleas and Exchequer as against that of the Queen's Bench. In the present conflict we incline to think (if we may speak without presumption, where great masters of the law differ) that the practice of the Queen's Bench should be preferred to that of the other common law courts. As a matter of verbal interpretation, we think "cause of action" should be taken to mean the *whole* cause of action. Such has been the uniform meaning attributed to it when used in the English County Courts Act and in our Division Courts Act.

Again, to hold that provincial courts can entertain a suit against a foreigner where, for instance, only the breach of contract has taken place within the jurisdiction and he is not personally served, may give rise to very grave questions of what is clumsily called "private international law," in case the defendant has no assets within the province and it is sought to make him liable on the judgment so obtained in the forum of his domicile.

This is just one of those troublesome questions that can only be settled by a gradual course of decision. As it is merely a matter of practice, it is thereby excluded from being a subject of error or appeal, so that each court is left to independent action, and to do what seems right in its own eyes.

We are indebted to the kindness of R. A. Fisher, who has been appointed General Secretary of the Judicature Commission in England in the place of Mr. Bradshaw, who has been made a County Court Judge, for an early copy of the Second Report of the Commissioners, dated August 6, 1872. It is an interesting document, and especially so in view of the somewhat similar commission now sitting in Ontario, which, by the way, we hear has been cancelled. We trust that the time and labour devoted to the subjects committed to the Commissioners will not prove to have been thrown away. Mr. Justice Gwynne has presided as chairman, since the resignation of Mr. Justice Wilson, who was compelled, we regret to say, to give up his position, from ill health and pressure of judicial duties. We propose in our next issue to reprint as much of the Second Report of the Judicature Commission as will interest Canadian readers.

It has been held in Chambers by Mr. Justice Gwynne in *Jameson* v. *Kerr*, that goods may be replevied out of the hands of a guardian in Insolvency, notwithstanding the provisions of Con. Stat. U. C. cap. 29, sec. 2. This is an important decision. The same point has arisen in Nova Scotia, but has not yet been decided, so far as we have heard.

SELECTIONS.

BAGS AND GOWNS.

At an early period English lawyers began to adopt distinctive costumes. Indeed, since the time of Justinian the members of the legal profession have worn apparel indicative of their rank and calling. This was the natural expression of the ancient and mediæval mind, and was quite in consonance with a social condition which great faith was placed in forms and in ceremonials, and every class of persons was required to appear clothed in characteristic apparel.

In the reign of Henry VIII., when all the younger members of the bar and many of the older lawyers of eminence were adopting the gay costumes of the fashionable world, a series of restrictive rules were begun by the authorities of the four Inns of Court at London, and no less than a dozen orders were issued prohibiting the wearing of gay apparel. In 26 Eliz. the Middle Temple instituted the following regulations in regard to apparel: "1. That no ruff should be worn. 2. Nor any white colour in doublets or hose. 3. Nor any facing of velvet in gownes, but by such as were on the bench. 4. That no gentlemen should walk in the streets in their cloaks, but in gowns. 5. That no hat, or long or curled hair, be worn. 6. Nor any gowns, but such as were of a sad colour." But in 1660 the lawyers resumed their brave and fashionable attire, the judges donned their wigs and wore, in Court, velvet caps, coifs and cornered caps, and barristers were adorned with long bands and falling collars. But gradually these fantastic details of costume became less prevalent among the profession, and finally there remained only the bag and gown for the practitioners and the robe for the judges, which had been professional accompaniments uninterruptedly for ages. The law is represented in the theatrical performances of Queen Caroline's time with a green bag in his hand; in the literature of Queen Anne's reign he is referred to in the same manner; and green bags were commonly carried by the great body of legal practitioners until a very recent date, while the king's counsellors, queen's counsellors, the chancery lawyers and the leaders of the common bar were honoured with the privilege of carrying red, purple or blue bags. The green bag was so characteristic of the profession in the reign of Queen Anne that "to say that a man intended to carry a green bag was the same as saying that he meant to adopt the law as a profession." But bags have disappeared entirely from the English courts, and the gown is the only distinctive species of costume which has withstood the advances of inattention to costume and plainness of dress, even in juridical, formal and conventional England. The robes of her judges, the silk gowns of her royal counsellors and leading barristers, and the stuff gowns of her common law lawyers are likely to be perpetuated for centuries as being perfectly appropriate to an advanced civilization, as a concession to a sober demand for some distinctive professional insignia, and as becoming the dignity, solemnity, authority, and learning of the bench and bar. And it is much to be regretted that the profession in this country should be without any distinctive apparel, at least while in Court. We do not advocate a return to the costume of English judges and barristers of the Middle Ages—to wigs, coifs, caps, bands, and collars, or even to green, red, blue, or purple bags, for these (particularly all but the bags) would not become a dignified and learned profession in a scientific and intellectual period. But extensive use of the robe and the gown, we believe, would add lustre, distinction, and gravity to the bench and the bar, and would be an incentive to all wearers of these professional insignia to render themselves worthy the distinction.

The American lawyers before and immediately after the time of the rupture between the colonies and Great Britain adopted the contemporaneous manners and customs of the English lawyers. But the revolution effected a great change not only in the commercial and military condition of this country, but also in the spirit of the people; and it was sufficient to condemn anything not absolutely necessary for the preservation of life, to concede that it was "English." This influence, combined with the free and independent character of American at the close of the eighteenth and the beginning of the nineteenth centuries, was more than sufficient to abolish many social and professional customs and costumes which had been introduced from abroad and initiate a simple, unostentatious and even inelegant style of living and dress. But it appears to us that both of these elements (that of rudeness and newness of national life and that of prejudice against anything foreign) have been outgrown, in a great measure, in the United States, and that with our advancing power, education, and refinement, with the decline of national prejudice and the increase of our understanding of the proprieties, we ought to adopt some distinct dress for our lawyers. A learned English serjeant once said that "the farther he went west the more he was convinced that the wise men came from the east." But it seems that this observation needs a little modification, when we consider that the bar of St. Louis, a principal western city, have been the first in the country to adopt this wise habit of appearing in court in gowns. Perhaps it may be explained on the hypothesis that the practice was introduced by certain wise men who emigrated thither from the east. However that may be, in all seriousness we consider it both for the interest and the dignity of the profession that the robe and the gown be universally adopted in all our higher Courts. The Supreme Court of the United

States should not alone clothe her judges in official robes, nor the bar of St. Louis alone wear learned gowns. A custom universally practised among the enlightened and intellectual nations of Europe should not be ignored by Americans, especially when there is added to the influence of example a noble and correct national sense of the propriety and desirableness of that custom. And with a bench possessing learning, gravity and authority, and clad in impressive robes, with a bar educated, honourable, and industrious, and clothed in the dignified gown, the legal sense of the nation will no longer be pained by the spectacle of a profession striving, under many weights, to preserve its great name, its honourable reputation, and its respectable authority among men.—*Albany Law Journal.*

The Tercentenary Commemoration of the Middle Temple Hall is worth more than a passing notice in the newspapers. It is a really great event in the history of the Society to which it belongs. Apart from the associations connected with the Hall, others than Templars will be ready to admit that there are few finer specimens of the kind of Elizabethan architecture which it represents. The historical associations, however, are of a singularly rare character. To say nothing of the tradition about the wood from the Spanish Armada, which modern scepticism has cast its evil eye upon, there is the apparently better founded tradition, that "Midsummer Night's Dream" was read here by Shakespeare, in presence of Queen Elizabeth. There are the wainscoted panels on the walls containing the arms and names of the readers, from Richard Swaine, reader, in 1597, down to the present year. There is the old oak screen, evidently not much younger, though not coeval with the building. There are the suits of armour probably of great antiquity; and the colours of the Inns of Court Volunteers, of 1803. The windows contain nearly a hundred and fifty of the armorial bearings of persons of rank, who have been members of the Middle Temple, the latest being that of the Prince of Wales, who was made senior bencher in 1861. Above the dais at the western end is placed a full-length equestrian portrait of King Charles I., by Vandyck, one of four replica copies of the same picture, of which the other three are at Windsor Castle, Warwick Castle, and Chatsworth respectively. There are also fine portraits of Charles II., James, Duke of York, William III., Queen Anne, and George II., besides marble busts of the present Prince of Wales, of the brothers Lords Eldon and Stowell, and of Plowden. The associations, too, are not peculiar to any period since its erection. The members have entertained many kings and queens from Elizabeth, and a generation later, Henrietta, the wife of Charles I., and, still later, Peter the Great, and William III., down to the Prince of Wales. The names of those eminent lawyers who have belonged to the Society and who were therefore familiar with the Hall, are scattered thickly about the pages of English history during the last three hundred years. Besides these names, the roll of the Society contains those of several poets and dramatists who are known to fame, amongst others, Sir John Davis, Knight, John Forde, Nicholas Rowe, William Congreve, Thomas Shadwell, Richard Brinsley Sheridan, and Thomas Moore.

To these, and other historical associations, the treasurer, Sir Thomas Chambers, to whom every member of the Inn is under deep obligations for the way in which the commemoration was celebrated, contrived to add features of a peculiarly interesting character. It was an excellent idea to disentomb the interesting passage about Sir Francis Drake's visit to the Hall, and to crown the reading of the passage by bringing forward a real live Sir Francis Drake, to respond to the toast of "The Descendants of the Ancient Members of the Middle Temple." It was equally interesting to have, in Earl Onslow, a representative of Mr. Speaker Onslow.—*Law Magazine.*

Iowa has added herself to the list of States which have abolished capital punishment. In that State all crimes heretofore punishable with death shall, hereafter, be punished by imprisonment for life at hard labor in the State penitentiary, and the governor shall grant no pardons, except on recommendation of the general assembly.

The tendency of modern philanthrophy is to make punishment for crime as easy as posible, in a physical point of view. Granting everything that may be said, in a general way, in favor of improved modes of punishing crimes we think that the danger is upon us of making the doom of criminals too easy, physically.

Death is the severest physical injury that can befall a human being, and it is only in the extremest cases that such a punishment should be inflicted at all. But we have been able to find no adequate reason for abandoning the custom of ages of putting one to death who wilfully and deliberately kills another. In such a case, at least, we believe in the strict *lex talionis*, the doctrine of "an eye for an eye," "a tooth for a tooth," a "life for a life," not to exact retribution (for that cannot be), but for the safety of society. Self-preservation is the first and strongest law of nature; and the professional criminal, at least, will run more chances of being imprisoned for life, than of being hung immediately on conviction. The laws specifying what crimes shall be punished by death, and regulating the execution of criminals condemned to death, may and ought to be, *modified* in many instances, but the total abolition of capital punishment is a dangerous experiment.—*Albany Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON PLEAS.

REG. EX REL CLEMENT V. COUNTY OF WENTWORTH.

By-law in aid of railway—Ratepayers' assent not obtained —By-Law quashed.

A by-law of a County Council, in aid of a railway, to the extent of $20,000, which had not been submitted to the ratepayers under the Municipal Institutions Act of 1866, was on that ground quashed.

[22 C. P. 300.]

In Hilary term last *F. Osler* obtained a rule to quash By-law No. 210, entitled "A by-law to aid the Hamilton and Lake Erie Railway Co., by a free grant or donation of debentures, by way of bonus, to the extent of $20,000," on certain terms, &c., on the ground that it was passed by the County Council without having been submitted to the vote, and without securing the assent of the ratepayers, and on other grounds.

It was admitted that the by-law had not been submitted to the ratepayers.

The by-law recited the desire of the council to aid the railway by a free grant or donation of debentures to the extent of $20,000, and that it would require $2,200 to be raised annually by special rate to pay the debentures and interest. The debentures were to be payable within twenty years, interest at six per cent., half yearly.

Burton, Q. C., now shewed cause, and urged, first, that on the construction of the Act, it was not necessary to submit any by-law granting a bonus to a railway to the ratepayers, irrespective of the amount.

Secondly, that, as this by-law was for an amount not exceeding $20,000, it need not be so submitted. He cited *Bramston* v. *Mayor of Colchester*, 6 E. & B. 246.

Osler, contra, referred to *McLean* v. *Cornwall*, 31 U. C. 314; *Jenkins* v. *Corporation of Elgin*, 21 C. P. 325; Dwarris Statutes, 568.

HAGARTY, C. J.—Section 349 of the Municipal Act of 1866, declares that a municipality may pass by-laws, 1st For subscribing for shares or lending to or guaranteeing the payment of any sum of money borrowed by a railway corporation, to which section 18 of 14 & 15 Vic. ch. 51, (Ry. Consol. Act), or sec. 75 to 78 of the Consolidated Railway Act have been, or may be, made applicable by any special Act. 2nd. For endorsing or guaranteeing debentures of railway companies. 3rd. For issuing debentures therefor. 4th. For prescribing the manner and form of debentures, and how they are to be signed. "But no municipal corporation shall subscribe for stock or incur a debt or liability for the purposes aforesaid, unless the by-law, before the final passing thereof, shall receive the assent of the electors of the municipality in the manner provided by this Act."

By the Ontario Act 34 Vic. ch. 30, sec. 6, the following sub-section is added to section 349 of said Act, "For granting bonuses to any railway, and to any person or persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures payable at such time or times, and bearing or not bearing interest, as the municipality may think meet, for the purpose of raising money to meet such bonuses."

Mr. Burton urged that this new sub-section was to be added to section 349, and would properly come after and not before the proviso as to submitting the by-law to the ratepayers.

We are fully satisfied that this view cannot be sustained. The last Act gives a further power to pass by-laws under a new sub-section, which we think is to form one of the group of sub-sections, and that the added sub-section, equally with the original subsections, is to be followed by and subject to the general proviso as to the assent of the electors.

We cannot understand any other construction according to the rules for interpretation of statutes, and apart from anything to be learned from authority, the natural construction of writing would place the sub-section in such a position. "No debt shall be incurred for the purposes aforesaid, unless," &c. These purposes were set forth in the preceding sub-sections, and here it is declared, not that a new section shall be added to the Act, but that a new sub-section shall be added to the 349th section.

It is, we think, to form part of that section, to be one of the "purposes" of the section, and must be subject to the general proviso as to "the purposes" aforesaid.

We can hardily concur that the Legislature could have designed, while forbidding the council from taking stock in a railway company without the electors' consent, to permit the council to make a present to the company of any amount they might please, without such assent.

The charter of this company (33 Vic. ch. 36, sec. 7,) makes it lawful for any municipality to aid the company by loaning, guaranteeing, or giving money, by way of bonus, or other means; provided that no such aid, loan, bonus, or guarantee shall be given except after the passing of by-laws and their adoption by the ratepayers as provided by the Railway Act, and provided also that such by-law be made in conformity with the Municipal Acts.

Section 77, Consolidated Railway Act Canada ch. 66, provides that no municipality should subscribe for stock, or incur any debt or liability under this Act, except by by-laws passed with the assent of the electors, &c.

It is then argued that counties can pass any by-law for a debt not exceeding $20,000 without such assent.

Section 227 of the Municipal Act enacts that every by-law (except for drainage under section 282) for raising upon credit any money, not required for ordinary expenditure and not payable within the year, must receive the assent of the electors, except that in counties the councils may raise by by-law, without submitting the same to the electors, for contracting debts or loans, any sum or sums over and above the sums required for its ordinary expenditure, not exceeding in any one year $20,000.

The decision of the first question seems to involve the second also.

If, as we think, the council cannot incur a debt by by-law to grant a bonus to a railway

except with the ratepayers' assent, it seems to follow that the rule must equally apply to a bonus below as above $20,000.

The power to pledge the credit of the county to the extent of $20,000, without the electors' assent must, we think, be certainly confined to lawful purposes, and not to a grant to a railway company, which can only be done with such assent.

The case may be shortly summed up thus:

By-laws to raise money for all lawful purposes beyond the ordinary expenditure, and not payable within the year, must be submitted to ratepayers, except that counties may raise on credit money not exceeding $20,000 in any one year without such submission.

But *all* aid to railways must be with the assent of the ratepayers; therefore *no* money can be given without such assent without reference to the amount.

Gwynne, J.—If it had not been for the earnest manner in which Mr. Burton, for whose opinion I entertain the greatest respect, pressed his view upon us, I should have thought the point to be free from doubt. The whole force of his argument was that the additional sub-section, added by 34 Vic. ch. 30 to sec. 349 of the Municipal Institutions Act of 1866, must be read after the proviso at the end of the 4th sub-section of section 349; from which he drew the conclusion that the additional sub-section was not subject to the proviso. Now there is nothing in the language or structure of the sub-section enacted by 34 Vic. ch. 30, which requires that it should be so placed as contended for. The words of the 34 Vic. are, "The following sub-section is added to section 349" of 29–30 Vic. ch. 51, "For granting bonuses to any railway, &c." Now the 349th section, to which this new sub-section is added, is as follows: "The council of every township, county, city, town and incorporated village may pass by-laws." Then follow four sub-sections stating the respective purposes, all beginning with the word, "For," and stating the purpose. Now the additional sub-section enacted by 34 Vic., will read as well, whether placed before the first sub-section or between it and any of the others, as after the 4th; but assuming that, having regard to the time of its being passed being subsequent to the enacting of the original section, it should be inserted and read after the fourth, then its proper place appears to be before the proviso, thus keeping all the powers together. If it be read after the proviso, then the purpose declared in the new sub-section would seem to be unnaturally and ungrammatically separated from the words at the commencement of the 349th section, so as to require their mental repetition before the words "For granting bonuses, &c.," to make the latter enactment sensible.

But, correctly speaking, the words at the end of the 349th section, commencing, "But no Municipal Corporation shall," &c., are no more part of the fourth sub-section of the 349th section of the Act of 1866 than of any other of the sections. Their true character is that of a proviso to limit a qualification upon,—or exception from,—the whole section. They are not a *part of*, but a qualification *upon*, the section. When then the Act 34 Vic. declares that "the following sub-section shall be added to section 349," the subsection so added becomes *part* of the section, subject to all *its* incidents; it is inseparably annexed to a section which is subject to a proviso, and being so annexed, must be subject to the proviso, to which its principal, and that of which it is a part, is subject. The by-law, therefore, here passed, for granting a bonus to a railway, must, to be operative, receive the assent of the electors in the manner required by the Municipal Institutions Act of 1866.

Galt, J., concurred.

Rule absolute to quash by-law, with costs.

CHANCERY CHAMBERS.

(*Reported for the* Canada Law Journal *by* T. Langton, M.A., *Student-at-Law.*)

Gunn v. Adams.

Assignment for the benefit of creditors—Composition deed—Time within which creditors may come in under the deed—Effect of creditors neglecting to sign within the prescribed time—Accession by assent and acquiescence—Statute of Limitations—Practice.

Where a debtor made an assignment to trustees for the benefit of his creditors, providing by the terms of the instrument that the benefits conferred by it should be confined to those creditors who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and had neglected to sign it, but had notified one of the trustees of his assent; and where another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and where another, though aware of the deed and its provisions, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary or taken proceedings hostile to it.

Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse.

Objection being made to the application being made by petition in Chambers, and not by a separate suit.

Held, that it was properly made in Chambers by petition in the original suit.

The Statute of Limitations being urged against the admission of the claims.

Held, that the relation of *trustee* and *cestui que trust* had been established between the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. There was also the additional reason in two cases that the statute had never begun to run owing to the creditors' right of action having arisen after the debtor had absconded.

[Chancery Chambers, April 16th., 1872.—*Mr. Taylor.*]

This suit was brought for the purpose of carrying into execution, under the decree of the Court, the trusts of a deed of composition and discharge and an assignment made in Nov., 1859, by one Pomeroy of all his estate and effects to the defendants, the trustees, for the benefit of his creditors generally. A decree was pronounced in June, 1871, referring it to the Master to inquire who were the creditors of Pomeroy, whose debts were provided for by the deed, and directing a division of what remained, after payment of costs, rateably among the creditors of Pomeroy, who should have become parties to the deed within one year from its date or in writing notified the trustees of their intention to become parties. Shortly after making this deed Pomeroy absconded.

Two of the creditors, whose claims had been rejected by the Master in consequence of their

not having complied with the terms of the deed in February, 1872, presented their petitions to be allowed to come in, and prove their claims in the Master's office. The petitioner Hardy at the time had been aware of an assignment having been made, but not of the terms of the deed. Within a year, however, he had assented to it, and gave a notice to one of the trustees, though whether in writing or not was doubtful, but he had never complied strictly with its terms. The petitioner Johnson, living in an out of the way place, and taking in no newspaper, had never heard of the deed, nor seen the published notice of it until he had filed his claim in the Master's office under the decree, and he then gave his assent. He had never taken proceedings to enforce his claim, nor in any way acted contrary to the provisions of the deed

W. G. P. Cassels, for the creditors who had acceded to the terms of the deed, opposed the application, and read affidavits as to the registration of the deed, and publication of notice of it with a view to proving a notice of its terms, which would be binding upon all creditors.

C. Moss, for the petitioners, said that it had been argued that the registration of the deed was notice of its provisions to all creditors, but this was not, he contended, the effect of the Registry laws. Their effect was to constitute registration notice to any one afterwards dealing with these lands, but that it was notice to all the world had never been held. The question of notice had been brought forward to shew that Johnson was debarred from proving his claim by the fact of an advertisement of the deed having been published eighty-two times in a newspaper. He thought it was necessary for such a contention to shew that the person against whom it was desired to prove notice, took in the particular newspaper. There was an analogy in the decisions as to dissolutions of partnerships. There an advertisement of the dissolution was not notice to any one not taking in the newspaper, *Boydell* v. *Drummond*, 11 East 142; *Leeson* v. *Holt*, 1 Stark 186; *Jenkins* v. *Blizard*, 1 Stark 420. And an advertisement in this country to constitute notice to all the world must be inserted in the *Gazette*. The facts of Johnson's not having been aware of the trusts of the deed until after decree pronounced of his never having acted contrary to his provisions, and of his willingness to assent to its terms when made known to him entitled him to share in the privileges of it. In the case of *Whitmore* v. *Turquand*, 1 Johns. & Hem. 444, where the question was whether certain persons had acceded to or gone against a deed. V. C. Page Wood said that persons who had done nothing either for or against a deed of this kind were entitled to come in and prove their claims, and this decision was affirmed upon appeal (8 DeGex. F. & J. 107). It was argued there that quiescence was not accession, and that the deed being expressly upon trust for those who acceded within three months the Court had no jurisdiction to divide the property among persons who had not brought themselves within this description. But Lord Chancellor Campbell said that "since the case of *Dunch* v. *Kent*, 1 Vern. 260, the doctrine of the court has been that the time limited by such a deed for the creditors to come in is not of the essence of the deed." Again, "the intention was that all creditors should come in and take a dividend, and that the debtor after his cession should be freed from his liability to these creditors. The deed was not for the benefit of any particular class of his creditors, but for all equally. The period of three calendar months is evidently introduced with a view to hasten the arrangement, and to authorize the trustees when that period has expired to make a dividend, which the subsequent claim of other creditors should not disturb. This is the understanding which has long prevailed on the subject: and with this understanding, the supposed hardship upon a creditor who executes the deed the last hour of the last day of the limited period does not exist; for if he thinks he is secure against any more creditors coming in afterwards, and feels confident that he must receive twenty shillings in the pound, and for this reason consents to execute the deed, he has a right only to blame himself for being ignorant of the law, which he ought to have known, as he ought to know the days of grace given for the payment of a bill of exchange.

W. G. P. Cassels objected that (1) Chambers was not the proper place for an application of this kind. There was no practice which could warrant the addition of parties in this way after a Master had refused to add them. In such a case they could only be added by filing a bill for that purpose. (2.) Both these claims were barred by the Statute of Limitations. Johnston's debt had accrued in 1859, and the petition and affidavit shewed no assent, he thought, to the deed, which could operate in taking it out of the statute. Johnston knew nothing of the deed, and he did not prosecute merely because he did not know of Pomeroy's having left any property so that there was nothing to prevent the statute from running (*Darby* on Limitations, 189). (3.) Both claims were also barred by *laches*. They had lain by now for ten years. In the case of *Joseph* v. *Bostwick*, 7 Grant 332, and *Collins* v. *Reese*, 1 Coll. 675, it was true that the time had not been considered material, but this was on account of special circumstances, which were absent in this case. As to Hardy he had not actually executed the deed, but he had assented to it. This, he submitted, was insufficient. He must have done *some act* or must have been prejudiced and prevented from proceeding in some other way (*Snell* Principles of Equity, p. 71). And even supposing that Hardy was entitled, this fact could not save him from the statute. He must have been a party to the deed to render the statute inoperative.

Rae, for the defendants, and *Foster*, for the plaintiffs, submitted to what order the Court might make.

Moss, in reply: There was nothing to shew that the estate was not given to pay all claims in full, and in such case other creditors would not be allowed to take advantage of a mere error when the parties beneficially entitled to the residue made no objection. All the objections taken were technical (1) that the application was not made in the proper *forum*. But in all kindred cases it had been made in Chambers in *Schreiber* v. *Fraser*, 2 Ch. Ch. 271, and in *Andrew* v. *Maulson*, 1 Ch. Ch. 316; (2.) That the claims

were barred by the Statute of Limitations. This, he submitted, was a question for the Master, and all that need be decided upon this application whether the petitioners were entitled to prove their claims, not whether they had any claims or whether their claims were good. The claim of Hardy was one in the schedule. He had endorsed a note of Pomeroy's, it was not due when Pomeroy left the country. He paid it when due, and thus became a creditor of Pomeroy's and when his right of action accrued Pomeroy was out of the country, and this fact apart from any trust in his favour under the deed was a bar to the Statute's running against him. So with Johnston's claim. He had become surety for Pomeroy in a bond to B. S. Upon Pomeroy's absconding Johnston became liable to and having paid B. S. he became a creditor of Pomeroy's. In addition to this he submitted that the trust deed had the effect of charging all Pomeroy's debts on his real estate, and preventing the statute from running against his creditors. (3.) As *laches* this objection could not apply to Hardy, to who had done every thing necessary except sign the deed, it was aimed at Johnston, and this very fact of his taking no steps independently, but acting as if he were a party to the deed was one of the grounds upon which he relied. If he had instituted proceedings for the recovery of his debt independently of the deed he might have disentitled himself to any benefit under it. (4.) As to the last objection that assent alone was not sufficient, the petitioners could only have shewn their assent more strongly by executing the deed, and *Whitmore* v. *Turquand* was so clear on this point that it was useless to discuss it.

Mr. Taylor on this application allowed both petitioners to come in and prove their claims, holding (1) that it was not necessary to file a bill in order to obtain the relief sought from the fact that a suit was pending and the application was properly made in Chambers by petition in the suit. Hardy's case was a similar one to *Pyper* v. *McDonald*, 5 U. C. L. J. (O S.) 162, where no bill was considered necessary. (2.) That the debts were not barred by the statute for the absence of Pomeroy from the country during a period commencing before their right against him accrued and extending to the present time, had prevented the statute from beginning to run. Lastly, it was plain from *Whitmore* v. *Turquand*, 1 John & Hem. 444, and from the late case *Re Baber's Trusts*, L. R. 10 Eq. 554, that a party who had done nothing inconsistent with the deed was entitled to the benefits it secured, and in the latter case, too, the application had not been by bill.

On the 15th April last a similar petition was made by one C. Stead. His position differed materially, however, from that of the former petitioners, Hardy and Johnston, in this, that he was unable to plead ignorance of the deed, and his only ground for being admitted to share the benefits it conferred, was, that he had taken no proceeding hostile to it, but had thus virtually acquiesced in its provisions, and trusted to being paid his claim in due course of administration. Evidence was also put in by the creditors to shew that Stead's claim was a joint one against Pomeroy and one Mathews; that he had sued the estate of Matthews, and proved his claim against it, and therefore could not prove against the Pomeroy estate.

C. Moss contended that to disentitle a creditor *after any lapse of time* to come in, it must be shewn that he acted contrary to the deed, *e. g.* by proceeding against the estate at law. He cited *Joseph* v. *Bostwick*, 7 Grant 382, where a creditor was debarred from enjoying the benefit of such a deed by contesting it, and trying to establish a prior claim; and he submitted that where a party had merely neglected to comply with the strict terms of the deed no lapse of time would prevent him from coming in under it, even, it seemed, where dividends had been paid, on the terms, however, of not disturbing such dividends, *Re Baber's Trusts*, L. R. 10 Eq. 554, was the latest authority, and there *Spottiswoode* v. *Stockdale*, 1 G. Cooper 102, was referred to where Lord Eldon lays down what was now contended, and that too in a case where a proviso was inserted in the deed that it was *to be void unless executed by the creditors within eleven months*. No such provision was contained in this deed, and there was no time limited for notifying the trustees; the year limited referred, only to the execution of the deed. He contended also that it need not be shewn on this motion whether or not Stead had been paid out of the Matthews estate or whether his claim was barred. These were questions for the Master. All that need be decided upon this motion was whether Stead was entitled to prove what he claimed.

Cassels argued that it should be shewn that he had a valid claim before putting the estate to the expense of investigating it, and that if a person having knowledge of the deed did not choose to ascertain whether he had a right under it, he should not be allowed to claim the benefit of it after allowing sixteen years to go by. Stead's evidence shewed that he had always thought the Matthew's estate was liable for his claim; he had a right to prove his full claim against it, as the note under which he was a creditor was joint, and it should be assumed that he had proved to the full extent of his right when he did prove against the Matthew's estate. He again urged the objection of the Statute of Limitations, and contended that it was properly urged now, for though it was for the Master to decide a disputed *amount*, yet it should be shewn on this application that the debt was a valid one.

Moss replied that the evidence shewed that he still claimed $5,000, and that as Stead was mentioned as a creditor in the schedule to the deed, he became a *cestui que trust*, and the Statute of Limitations ceased to affect him from the date of the assignment to the trustees and their acceptance of the trusts.

Mr. Taylor, the Referee in Chambers.—The petitioner claims to be a creditor of S. S. Pomeroy, and, as such, entitled to the benefit of an assignment, made by Pomeroy for the payment of his creditors, the trusts of which are being carried out under decree in this cause. His claim appears to have arisen thus: He held a note made in April, 1856, by Mrs. Matthews and Pomeroy, the consideration for the note being an alleged balance due to him for

work done on the property of the Matthews' estate, of which Mrs. Matthews was executrix, and which Pomeroy, a son-in-law, managed as her agent. Upon this note he came in to prove in a suit in this court of *Morley* v. *Matthews*, where part of his claim was allowed and the remainder disallowed, on the ground, as I understand, that it was for work done not for the estate, but upon a portion of it, to which Pomeroy was individually entitled. It is in respect of this balance that he now seeks to prove under the decree in this suit. The deed of trust for the benefit of creditors was made by Pomeroy as far back as November, 1859, and provided for its being executed by the creditors within twelve months. Due public notice of the execution appears to have been given by the trustees, but it has never been executed by the petitioner, nor does he appear ever to have informed the trustees of his acquiescence in the deed. His name appears in a schedule annexed to the deed as one of the creditors of Pomeroy. The question is whether he is now at this late date entitled to participate in the benefit of that deed. In considering the question of delay, it is important to remember that although the deed was made in 1859, no dividend has ever been declared under it. Indeed, the trustees seem to have taken no steps to distribute the estate, nor did any creditor take proceedings to enforce a distribution until the filing of the bill in this cause, in the spring of 1871. The petitioner it appears knew of the deed being executed by Pomeroy, probably soon after it was executed, though the exact time when he became aware of it does not appear. He says, however, that he did not know of the terms of the deed, or of creditors being required to become parties to or execute the deed within a given time. He did not take any step to notify the trustees of his claim or of his intention to take the benefit of the deed, because, he says, he did not think anything would ever come to their hands for payment of the creditors, and that he would be paid his claim out of the Matthews' estate. It is not shewn that he has taken any proceedings hostile to the terms of the deed or inconsistent with them. He has simply lain by or done nothing. Now it is well settled that even although a deed, like the one in question, have limits, a time within which the creditors are to execute it, a creditor who has failed to do so is not necessarily excluded from the benefit of the trusts. *Dunch* v. *Kent*, 1 Vern. 260; *Spottiswoode* v. *Stockdale*, 1 G. Cooper, 102; *Rawworth* v. *Parker*, 2 K. & J. 168. It is sufficient if he has assented to it or acquiesced in, or acted under its provisions and complied with its terms (*Field* v. *Lord Donoghmore*, 1 Dr. & War. 227). No case seems to lay down what acts are necessary to constitute such assent, acquiescence or compliance. All the cases except two, which I shall afterwards refer to, where creditors have been excluded, are cases where they have acted inconsistently with the terms of the deed; as by bringing an action against the debtor when the deed contained a clause releasing him, (*Field* v. *Lord Donoghmore*, 1 Dr. & War. 227;) or as was said in one case actively refusing to come in, and not retracting he refusal within the time limited, (*Johnson* v. *Kershaw*, 1 DeGex & Sm. 260); or setting up a title adverse to the deed, (*Watson* v. *Knight*, 19 Beav. 369); *Brandling* v. *Plummer*, 6 W. R. 117. The two cases I mentioned above are *Lane* v. *Husband*, 14 Sim. 656, where the deed containing a release, a creditor was not allowed to come in, the debtor having in the meantime died, on the ground that the debtor could not then obtain the benefit of the consideration upon which the deed was based. The other is *Gould* v. *Robertson*, 4 DeGex & Sm. 509, which is cited in *White* and *Tudor's* L. C. as an authority, and the only authority for the proposition that a creditor who, for a long time delays, will not be allowed to claim the benefit of the deed. In that case, however, there was a provision, not found in the present deed, that in case any creditor should not come in under the deed for six months, he should be peremptorily excluded from the benefit of it. V. C. Knight Bruce held that after six years, and a correspondence extending over all that period, upon the subject of the debt in question, the creditor was not entitled to share. In a later case—*Re Baber's trusts*, L. R. 10 Eq. 554—even such a provision has been held not to exclude a creditor.

The case of *Whitmore* v. *Turquand*, 1 J. & H. 444, was one where the question was considered in the case of a deed limiting a time for creditors to come in: a creditor who has neither assented to or dissented from the deed within the time, can afterwards be admitted to share together with those who acceded before the expiration of the stipulated time. There V. C. Page Wood allowed a creditor to come in after apparently six years, and his decree was afterwards affirmed on appeal (3 D. F. & J. 107). The latest case on this subject is *Re Baber's trusts*, L. R. 10 Eq. 554. There the deed contained the same provision as in *Gould* v. *Robertson*, excluding creditors who did not come in within a limited time, yet the creditor who all along knew of the existence of the deed and had corresponded with the trustees on the subject, but who was not aware of the provision rendering it necessary for him to execute within a limited time, was allowed to share a dividend even after nineteen years The circumstance that he had corresponded with the trustees would not seem to have been material under *Whitmore* v. *Turquand*, and was not even alluded to by V. C. Malins in his judgment. It was contended, however, that leave to come in would not be given unless the creditor had clearly a debt for which he could prove. In other words, that if it could be shewn now that there was no debt, the court would at once refuse the application and not leave the question to be inquired into by the Master. Here it is said the debt is barred by the Statute of Limitations, having accrued due in 1856. The present case is in this way distinguished from the one formerly before me in this suit, where the debt accrued due only after the debtor had absconded.

I incline to think that the debt here is not barred. The assignment is complete, it having been acted upon by the trustees, and communicated to some, at least, of the creditors, they having executed the deed. Under such circumstances it could not be revoked by the settlor.

Cosser v. *Radford*, 1 De Gex, J. and S., 585; *Acton* v. *Woodgate*, 2 Mil. and Keen, 495. In *McKinnon* v. *Stewart*, Lord Cranworth, in 1 Sim. N. S. 89, holding this, as clear as to creditors who have executed the deed, said, "Where they have not executed the deed, questions have often arisen how far by having been apprised of its execution, and so, perhaps, been induced to do or abstain from doing something which may affect their interests, they may not have acquired the rights of *cestuis que trust*. As all the creditors had, in that case, executed the deed, it was not necessary for him to decide the point. In Darby on Limitations, p. 190, *Simmonds* v. *Palles*, 2 J. & L. 409, 584; *Kirwan* v. *Daniels*, 5 Hare, 493; *Harland* v. *Binks*, 15 Q. B. 713, it is laid down that where creditors are parties to the assignment or it is communicated to them, the relation of trustee and *cestuis que trust* is constituted between the assignees and every one of the creditors, and so long as the property remains in the hands of the assignees, the right of any creditor to an account of the property and to payment out of it, is not barred by lapse of time.

Here the trustees are themselves beneficially interested, so the deed was not revocable. *Siggers* v. *Evans*, 5 Ell. & Bl. 367; *Lawrence* v. *Campbell*, 7 W. R. 170. That such a deed would create a good trust, for even those creditors to whom it was not communicated, and who were not parties to it, would seem to follow from *Griffiths* v. *Ricketts*, 7 Hare, 307, where Lord Langdale doubted whether such a trust having been communicated to some of the creditors, it could ever after satisfying them be revoked by the settlor, as to creditors to whom it had not been communicated. Besides, in the present case the settlor by the deed declares that the schedule annexed contains the names of the creditors and the sums due them respectively, and then provides that other persons not mentioned in the schedule, being *bona fide* creditors of his, may come in and share and participate in the advantage to be derived from the trusts, rateably, with the other creditors. In this schedule the petitioner's name appears as a creditor, and I think the trust prevented the statute from running against his debt.

The hardship of allowing a creditor to come in now upon those who signed the deed within the limited time was urged here, as it has been in almost all the cases on this subject. The courts have always refused to give effect to the argument, and I cannot be any more attentive to it here. The order will declare the plaintiff entitled to participate in the benefit of the deed, and to come in and prove his claim under the decree. As this is, I understand, a test case brought forward by arrangement, and by the decision in which all similar cases are to be governed, both parties should have their costs out of the estate.

ENGLISH REPORTS.

CHANCERY.

Cockayne v. Harrison.

Will—Construction—Bequest of farming stock during widowhood—Res quæ ipso usu consumuntur.

Testator being tenant of a farm from year to year, bequeathed his farming stock, consisting of consumable articles, to his wife during the term of her widowhood, and then over:

Held, that the gift was made for the purpose of enabling her to carry on the testator's business of a farmer, and that she was entitled to an interest in the stock during her widowhood only, the ordinary rule as to *res quæ usu consumuntur* not applying.

[26 L. T. N. S. 885, M. R.]

The testator, James Cockayne, a farmer, was at the time of his death in the occupation, as tenant from year to year, of two farms, one at West Bridgford and the other at Sneinton, in the county of Nottingham. By his will, dated the 21st October, 1868, he gave and bequeathed to his wife Jane such furniture (to be selected from the testator's furniture at West Bridgford) as should be sufficient to furnish her a comfortable room at his farm at Sneinton, which furniture, together with his farming stock and all other personal estate and effects at Sneinton aforesaid, the testator gave and bequeathed to his wife during the term of her widowhood, and from and after the time of her marrying again, or her decease, he gave and bequeathed the same to his executors, upon trust for sale.

The testator died on the 28th October, 1868, when his widow took possession of the farming stock and carried on the farm. In 1870 she married again.

Two suits, which had been instituted for the administration of the testator's estate, now came on for further consideration, and a question arose as to what interest the widow took in the articles comprised in the bequest of farming stock, consisting of manure, beasts, growing crops, stacks of hay and straw, clover, corn, turnips, and other consumable articles; whether an absolute interest or an interest for the term of her widowhood only.

Horace Davey, for the parties having the conduct of the suits.

Fellows, for the widow, contended that the gift was absolute, being a gift of things *quæ ipso usu consumuntur*. He referred to *Andrew* v. *Andrew*, 1 Coll. 692; *Bryant* v. *Easterton*, 5 Jur. N. S. 166; *Randall* v. *Russell*, 3 Mer. 194; *Groves* v. *Wright*, 2 K. & J. 347.

Horace Davey, in reply.—*Groves* v. *Wright*, (*sup.*) is a clear authority that a gift of farming stock does not come within the rule as to *res quæ ipso usu consumuntur*. The testator intended to give the widow the usufruct of the farming stock, so as to enable her to carry on the farm, and not to make it an absolute gift.

[*Fry*, Q. C., *amicus curiæ*, referred to *Phillips* v. *Beal*, 32 Beav. 25.]

Lord Romilly said that there seemed to be a conflict of authority as to a gift of a life interest in perishable articles, such as farming stock, but he was disposed to follow his own decision in *Phillips* v. *Beal* (*sup.*), and hold that, as the gift of farming stock was apparently made for the purpose of enabling his widow to carry on the

farm, it was a gift of a limited interest only; that the widow was bound to keep up the stock so long as her interest continued, and in the event of any part having been sold, she was entitled to the income arising from the investments of the proceeds of sale.

Hadley v. McDougall.

Practice — Production of documents — Joint possession — Entries in partnership books of individual transactions of one partner.

A person who had carried on certain business transactions on his own account, and had made entries relating to them in the partnership books of a firm of which he was a member, was made defendant to a suit for an account of those transactions:

Held, (reversing the decision of Malins, V. C.) that no order could be made for the production of the partnership books, as one of the joint owners of them was not a party to the suit; but that the plaintiff's proper course was to amend his bill so as to compel the defendant to set forth copies of the entries in question, and then to obtain production of the books themselves at the hearing by serving the defendant's partner with a *subpœna duces tecum*.

[26 L. T. N. S. 879, L. J.]

This was an appeal from a decision of Malins, V. C. The bill, which was one for an account of transactions relating to a contract made with the defendant for the supply of saddlery to the French Government during the late war, alleged that the plaintiff was interested in the contract.

By his answer the defendant stated that he was in partnership with his father, and that the accounts relating to the contract in question were entered in the partnership books, although he (the defendant) was solely interested in the contract and it was not a partnership transaction.

The defendant having declined to produce the partnership books on the ground that his father refused to allow them to be produced, a summons was taken out to compel production, and an order to that effect was made in chambers, the defendant to be at liberty to seal up the parts of the books not relating to the transactions in question.

The Vice-Chancellor having confirmed this order the defendant appealed.

Glasse, Q.C. and *W. Pearson*, in support of the appeal.—We contend that this order cannot be sustained. *Murray* v. *Walter*, Cr. & Ph. 114, and *Reid* v. *Langlois*, 1 Mac. & G. 627, show that where a document is not in the exclusive possession of the defendant, but in the possession of somebody jointly with him, the production cannot be ordered. In the latter case Lord Cottenham says that that "is a well established rule, and cannot be considered as now open to dispute." [Sir *Roundell Palmer*, Q.C., as *amicus curiæ*, referred to *Taylor* v. *Rundell*, Cr. & Ph. 104, as showing that a defendant who has not exclusive possession of documents may be ordered to give in *ipsissimis verbis* any entries relating to the subject matter of the suit.] The ground of the rule is that the court cannot order a man to do what he has not legal power to do. They also referred to *Warrick* v. *Queen's College, Oxford* (No. 2) L. Rep. 4 Eq 254.

Cotton, Q.C. and *F. Harrison*, for the plaintiff. We contend that the appellants cannot be allowed to prevent the production of the parts of the partnership books containing entries relating to his son's private business transactions, after having allowed his son to use the partnership books for such purposes. *Reid* v. *Langlois*, (*sup.*) is distinguishable from this case, for there the entries of which it was sought to compel production related to partnership matters; while here they only relate to the private accounts of one of the partners.

Without calling for a reply.

Lord Justice James: The consequences would be very serious if we were to depart from the settled rules of the court. It is a settled rule that no order can be made for the production of documents which are in the possession of two or more persons, when one of the joint owners is not before the court. The plaintiff may amend his bill and compel the defendant to set out in his answer all the entries which he desires to see, and he can then require the books themselves to be produced at the hearing by means of a *subpœna duces tecum*. The order of the Vice-Chancellor must therefore be discharged. The costs of both sides will be costs in the cause.

Lord Justice Mellish concurred.

UNITED STATES REPORTS.

QUARTER SESSIONS, PHILADELPHIA.

Commonwealth ex rel. Dennis Shea et al. v. Wm. R. Leeds, Sheriff.

It is a conspiracy for two or more parties to act in concert in unlawful measures to enforce the Sunday Liquor Law. As by inducing a tavern-keeper to furnish beer on Sunday, by artifice or persuasion.

The mere admission of visitors into a tavern on Sunday is not an infraction of the Sunday Law, unless liquor is actually sold.

[Opinion by Paxson, J., May 4, 1872.]

This case was heard upon *habeas corpus*. The relators, Dennis Shea, Frank N. Tully and Charles Hooltka, were charged with conspiracy by one G. A. Barthoulott. The latter keeps a drinking saloon, and it is alleged that the relators were engaged with others in a series of prosecutions against liquor dealers for violation of what is known as the Sunday Liquor Law. The facts of this case, as they appeared at the hearing upon the writ of *habeas corpus*, were substantially as follows:

On Sunday, the 24th of March last, the relators, Shea and Tully, called at the house of the prosecutor. The front door, window, and back entry were closed, but they obtained admission through a private entrance. There was no one in the bar-room when they entered but the prosecutor and one of his boarders. They asked the prosecutor for beer. He refused them, saying, "I don't sell beer on Sunday." After some persuasion, and being told by Shea that a friend of his (the prosecutor) had told them if they would call there they could get some beer, the prosecutor gave Shea and Tully two glasses of beer, repeating, however, his former declaration that he could not sell beer on Sunday. They then each took a piece of bread and wanted to pay for that; but this, also, was declined, and the prosecutor finally ordered them out of his place. Up to this point he did not know the relators.

U. S. Rep.] Commonwealth ex rel. D. Shea et al. v. W. R. Leeds.

On the 18th of April suit was commenced against Barthoulott, before Alderman Jennings, upon complaint of one David Evans, who styles himself the "Treasurer of the Tax-payers' Union," to recover the penalty of $50 imposed by section 2 of Act of February 26th, 1855, upon all persons who shall "sell, trade or barter any spirituous or malt liquors, wine or cider, on the first day of the week, commonly called Sunday." At the hearing Shea and Tully were examined as witnesses. The alderman dismissed the case. It further appeared that, after the above suit was commenced before the alderman, the said Evans stated to Mrs. Barthoulott, that if her husband would pay him $52.50, the suit would be discontinued and no criminal prosecution commenced.

There was also evidence that this was but one of a large number of suits before the same alderman for alleged violation of the law referred to. All of these suits were commenced upon complaint of the aforesaid David Evans, upon information furnished by these relators. In some of them there were offers to settle upon payment of penalty, with costs, to Mr. Evans, and one at least of the defendants testified that he had so settled with Mr. Evans, the latter agreeing to abandon any criminal prosecution.

For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the Sunday Liquor Law. If this was in truth their object, it was certainly a lawful one, and worthy of all commendation. Assuming such to have been their purpose, did they resort to any unlawful means to accomplish it? If they did, and if they acted in concert in the pursuance of a common design, there was a conspiracy. It was never intended that a man should violate the law in order to vindicate the law.

I am of the opinion that these relators, in their anxiety to procure evidence against Mr. Barthoulott, went a step too far. He was not engaged in any violation of law when they entered his place. They urged and persuaded him to furnish the beer; in fact they resorted to artifice and deception for that purpose. If any crime was committed, they were present aiding and abetting.

It was urged in extenuation of the conduct of the relators that their action was entirely in accordance with the practice in the detective service, not only of the police, but in other departments of the Government. This is not my understanding of the detective service. I have never known an instance of detectives deliberately procuring a man to commit a crime in order to lodge information against him. Such informers have been infamous from the time of Titus Oates.

We can have no sympathy with the men who sell liquor on Sunday in defiance of law. That there is a class of persons who habitually and insolently defy the law is a reproach to all who are charged with the prosecution of such offences. It is the duty of every good citizen to aid in the suppression of this Sunday traffic. The evils which flow from it are beyond all computation in dollars, and are felt and seen by every citizen. And I have no hesitation in saying, that few persons are more deeply interested in enforcing this law than those who are legitimately engaged in the liquor business. There is nothing which has done more to arouse an antagonism to the whole system than the spectacle witnessed every Sabbath, of drunken men reeling upon our streets.

I am aware of the difficulty of procuring testimony against this class of offenders. It is believed, however, that with proper vigilance on the part of the police, and a hearty co-operation on the part of all good citizens, the selling of liquor on Sunday cannot be carried on to any great extent. Be this as it may, the resort to such means as the Commonwealth alleges were employed in this case is more than questionable. The law does not sanction it, and no solid moral reform will be promoted by it. It is quite possible that when the relators come to be heard in their defence, they may show an entirely different state of facts from those above stated. What I have said is based upon the facts as they now appear. The relators will have an ample opportunity of vindicating themselves before a jury, and for that purpose they are remanded.

DIGEST OF ENGLISH LAW REPORTS.

(*From the American Law Review.*)

FOR FEBRUARY, MARCH AND APRIL, 1872.

Action.—*See* Lease; Negligence, 2; Slander.

Adjudication.—*See* Bankruptcy, 8.

Administrators.—*See* Executors and Administrators.

Agency.—*See* Principal and Agent.

Agreement.—*See* Contract.

Agricultural Purposes.—*See* Tillage.

Ambiguity.—*See* Legacy, 6.

Appointment.—*See* Power 1.

Assault.—*See* Evidence, 1.

Assignment.—*See* Bankruptcy, 1, 7; Landlord and Tenant, 1; Lease; Railway, 1; Sheriff.

Average.—*See* General Average.

Bailment.

The defendants received, as ordinary bailee, a dog to be carried on their road. The dog had on its neck, when delivered to the defendants, a collar, to which was attached a strap. The defendants secured the dog by the strap, and the dog slipped its collar, escaped, and was killed. *Held*, that securing the dog by the collar was the ordinary and proper way, and that the defendants were not guilty of negligence in fastening the dog by the strap suggested by the plaintiff, who delivered the dog without notice that the fastening was unsafe. Judgment for defendant.—*Richardson* v. *North Eastern Railway Co.*, L. R. 7 C. P. 75.

Bank.—*See* Company, 7; Executors and Administrators, 1.

Bankruptcy.

1. A. covenanted with the trustees of a marriage settlement to effect insurance on his life for £2000. A. was insured in two policies of £500 each. On Oct. 29, 1869, A. handed one policy to the trustees, and on Dec. 9, signed a memorandum stating that he delivered up and handed over said two policies to the trustees. Dec. 13, A. was adjudged bankrupt; in Jan. 1870, he handed the second policy to the trustees; and in Dec. 1870, he died. Notice that the policies were claimed by the trustees was given to the insurance offices, after A. was adjudged bankrupt, but before any notice was given by the assignee. *Held*, that the assignee was entitled to the money due on the policies, as they were in the order and disposition of the bankrupt with the consent of the true owners. — *Ex parte Caldwell; In re Currie*, L. R. 13 Eq. 188.

2. The word "due" in the English Bankrupt Act means "presently payable." — *Ex parte Sturt; In re Pearcy*, L. R. 13 Eq. 309.

3. Under the English Bankrupt Act of 1869, an execution creditor who has seized the goods of his debtor before petition filed for adjudication of bankruptcy, was *held* entitled to the proceeds. The 87th section of said act referring to traders includes only traders at or after the act came into operation.—*Ex parte Bailey; In re Jecks*, L. R. 13 Eq. 314.

4. Under the English Bankrupt Act the holder of a note signed by two members of a firm, by the firm, and by other persons, was allowed to prove against, and receive dividends from, the estates of the said two partners and against the joint estate of the firm.—*Ex parte Honey; In re Jeffery*, L. R. 7 Ch. 178.

5. A bankrupt who had not received his discharge paid six months' rent in advance to his landlord, who had notice of the bankruptcy. *Held*, that the money could not be recovered from the landlord by the assignee in bankruptcy.—*Ex parte Dewhurst; In re Vanlohe*, L. R. 7 Ch. 185.

6. A debtor promised to call and pay a debt at an appointed time, but failing to obtain money, he did not call, but stayed at his place of business. *Held*, that the debtor had not absented himself with intent to defeat or delay creditors, and therefore had not committed an act of bankruptcy. — *Ex parte Meyer*; *In re Stephany*, L. R. 7 Ch. 188.

7. A debtor to secure an antecedent debt assigned the whole of his property, except a pension, which would not pass to the trustee in bankruptcy, and could not be taken in execution by a creditor. *Held*, that the assignment was an act of bankruptcy. — *Ex parte Hawker; In re Keely*, L. R. 7 Ch. 214.

8. Under the English Bankruptcy Act it was *held* that a judgment creditor who seized goods under execution, but had not actually sold them, before adjudication of bankruptcy, was entitled to sell goods and retain the proceeds. —*Slater* v. *Pinder*, L. R. 7 Ex. (Ex. Ch.) 95; s. c. L. R. 6 Ex. 228; 6 Am. Law Rev. 81.

See Proof.

Bequest. — *See* Devise; Legacy; Power; Tenancy in Common; Trust; Will.

Bill in Equity.

The plaintiff, an Englishman, contracted in France with the defendant A., a Frenchman, for the joint carrying out of certain undertakings. The defendants B. and C. were merchants in London, into whose hands money had come in the course of the transactions. The plaintiff brought a bill praying among other things that an account be taken of the money in the hands of B. & C. under said transactions. The defendants moved that proceedings be stayed until the determination of a suit by the plaintiff against the defendant A. pending before the civil tribunal in France. *Held*, that there being portions of the bill which the defendants were bound to answer, the motion, which was in the nature of a demurrer, must be refused.— *Wilson* v. *Ferrand*, L. R. 13 Eq. 362.

Bill of Lading.—*See* Sale 1; Ship.

Bills and Notes.

1. The maker of a note in 1846 indorsed the note with his name and the year 1866. *Held*, that the indorsement was a sufficient acknowledgment to take the note out of the statute of limitations. — *Bourdin* v. *Greenwood*, L. R. 13 Eq. 281.

2. The plaintiff, for a consideration paid by A., accepted certain bills drawn by X., which were discounted by the defendant, A. guaranteeing payment. The defendant at the time of receiving the bills had no knowledge whether they were accepted for valuable consideration or not, but before maturity was informed that A. was primarily liable, and the plaintiff only as surety. After this the defendant agreed with A. to hold over for a time the bills which were then payable. *Held*, that the plaintiff was thereby discharged. — *Oriental Financial Corporation* v. *Overend*, L. R. 7 Ch. 142.

3. Indictment for forging an instrument being an I. O. U. for thirty-five pounds purporting to be signed by the prisoner and one W. The latter's name was forged. *Held*, that the in-

strument was an "undertaking for the payment of money" within 24 & 25 Vic. c. 92 s. 23.—*Reg.* v. *Chambers*, L. R. 1 C. C. 341.

See Bankruptcy, 4; Priority; Proof.

Bond.—*See* Merchant.

Broker.

1. A jobber in the stock exchange agreed to purchase certain shares of the plaintiff, and gave him a ticket containing the name of the transferee to whom the shares were afterward tranferred. Subsequently the transferee turned out to be an infant, of which fact both the other parties had been ignorant, and the plaintiff was obliged to pay calls on the shares. The plaintiff brought a bill alleging that the jobber was the principal in said sale, and praying specific performance and indemnity for all past and future calls. *Held*, that the custom of the stock exchange discharging a jobber when he had given the name of the transferee and paid for the shares, discharged the defendant.—*Rennie* v. *Morris*, L. R. 13 Eq. 208.

2. The defendants, fruit-brokers, gave the plaintiffs a contract note as follows: "We have this day sold for your account to our principal, fifty tons raisins. M. & W., Brokers." The defendant's principal accepted part of the raisins only, and the plaintiffs sued the brokers, offering evidence of a custom in the London fruit trade that if the principal was not named in the contract note the broker was personally bound; also of a similar custom in the London colonial market. *Held*, that the evidence was admissible, and that the brokers were liable for the non-performance of the contract.—*Fleet* v. *Murton*, L. R. 7 Q. B. 127.

3. The defendant, a merchant in Liverpool, employed the plaintiffs, tallow-brokers in London, to buy fifty tons of tallow for him in London. By the custom of the London tallow trade, brokers contract in their own name and are personally liable for the total quantity of tallow they need, passing to their principals bought notes for the specific quantity ordered. The plaintiffs bought 150 tons of tallow and sent the defendant a bought note for 50 tons, according to said custom, and the defendant refused to accept. *Held*, (by Kelly, C.B., Channell, B., and Blackburn, J.), that the defendant was bound by said custom. *Held* (by Mellor and Hannen, JJ., and Cleasby, B.), that the plaintiffs, being employed as brokers, could not set up a custom of which the defendant was ignorant, whereby to make themselves principals.—*Mollett* v. *Robinson*, L. R. 7 C. P. (Ex. Ch.) 84; s. c. L. R. 5 C. P. 646; 5 Am. Law Rev. 473.

Building.

An unfinished house, of which all the walls, external and internal, were built and finished, the roof on and finished, a considerable part of the flooring laid, and of which the internal walls and ceilings were ready for plastering, *held*, a building.—*Reg.* v. *Manning*, L. R. 1 C. C. 338.

Cargo.—*See* Ship.

Carrier.—*See* Bailment.

Charge.—*See* Legacy, 1.

Charity.—*See* Legacy, 6.

Chose in Action.—*See* Husband and Wife.

Class.—*See* Legacy, 5.

Codicil.—*See* Will.

Common Carrier.—*See* Bailment.

Company.

1. The directors of a company formed to take the business of an old firm, issued a prospectus in which they omitted to state the insolvency of the firm. The directors believed that by obtaining additional capital from the sale of shares in the company, the business of the firm could be carried on with profit. *Held*, that the directors were personally liable for omission to state the firm's insolvency in the prospectus to the purchaser of shares, unless the latter postponed for an unreasonable time inquiry into the truth of the representations in the prospectus upon the faith of which he took his shares. *It seems*, that if an allottee of shares is barred from proceeding against the directors by time or condonation, his transferee is barred also.—*Peek* v. *Gurney*, L. R. 13 Eq. 79.

2. A. applied for shares in a company, and on March 15, shares were allotted him, and the letter of allotment was posted March 16. A. had omitted in his application the name of the city in which he lived, and in consequence said letter did not reach him until March 21. On March 20, A. posted a letter of allotment posted a letter withdrawing his application for shares. *Held*, that the letter of allotment posted to the address A. had given, was a good allotment.—*In re Imperial Land Co. of Marseilles: Townsend's Case*, L. R. 13 Eq. 148.

3. In 1865 S. agreed to become a director in a company and signed the memorandum of association for 200 shares. Before signing, the solicitor of the company informed S. that he could withdraw if two-thirds of the capital were not subscribed, but the articles of association only provided that the directors need not go on with the company if said amount were not subscribed. The directors resolved to begin business before said amount was subscribed, and S. therefore resigned as director, and his

resignation was accepted. No shares were allotted to S., and his name was not placed upon the list of shareholders. In 1870 the company was ordered to be wound up. *Held*, that the official liquidator was not precluded by lapse of time from placing S. upon the list of contributories.—*Sidney's Case*, L. R. 13 Eq. 228.

4. By the articles of association of a company its directors had power to receive from shareholders money paid in advance of calls on their shares. The directors were also to receive a certain compensation to be as they should determine. The directors paid into a bank the amount uncalled for on their shares, and drew it out the same day in payment of their fees. *Held*, that said payment was not *bonâ fide*, and that the directors were not relieved from liability on their shares.—*Sykes' Case*, L. R. 13 Eq. 255.

5. The plaintiff paid for and received scrip certificates which gave him the right to have a certain number of shares in a company as soon as the directors gave notice that they were prepared to register shares. The plaintiff never received such notice, but was registered as holder of shares, and an action was brought for calls on the same, to which he pleaded that he was not a shareholder. He afterward attended a meeting of the shareholders and signed his name on the attendance-book, headed "shareholders present," &c.; he also signed two proxy papers, in which he was styled a proprietor. He never intended to acknowledge himself a shareholder. *Held*, that the plaintiff was entitled as against the company to have his name removed from the list of shareholders. *McIlwraith* v. *Dublin Trunk Connecting Railway Co.*, L. R. 7 Ch. 134.

6. The M. company owed money not immediately payable to a contractor who had bought shares in the company, and was unable to pay his brokers for the same. A director in the M. company, also a director in the C. company, negotiated a loan of money from the latter wherewith to pay the contractor and enable him to take up said shares. The M. company had no power to purchase its own shares, and set up in defence of repayment that the sum borrowed was borrowed for the purchase of its own shares with knowledge of the C. company. *Held*, that the C. company was not affected with notice of the purpose to which the money was to be applied.—*In re Marseilles Extension Railway Co.; Ex parte Credit Foncier & Mobilier of England*, L. R. 7 Ch. 161.

7. The directors of a company devised the following plan for obtaining a sufficient number of subscriptions for shares to enable them to begin business according to law. The directors deposited £1500 with a bank whose manager was in the scheme, under the following agreement: The bank was to open an account with one S., loaning £1500,—the said company guaranteeing repayment, and charging their account with said loan and whatever sums S. should draw. S. was to obtain sham applicants for shares, and pay the requisite sum to the account of the company, drawing the necessary funds from the bank, and then receive blank transfers of said shares. The scheme was effected; and finally there stood to the account of the company £24,000, and therefore S.'s account was debited with the same sum. The company sued the bank for £24,000, apparently on the ground that said guarantee being fraudulent and void with notice to the bank, said sum remained to their credit and was due. *Held*, that said company was entitled to said £1500 actually deposited with the bank, and no more.—*British & American Telegraph Co.* v. *Albion Bank*, L. R. 7 Ex. 119.

See Contract, 1; Corporation; Injunction; Negligence, 2; Railway, 2; Trust.

Construction.

See Contract, 1; Covenant; Devise; Frauds, Statute of, 2; Insurance, 2; Landlord and Tenant, 2; Legacy; Merchant; Sale, 1, 2; Settlement; Tenancy in Common; Trust.

Contract.

1. By agreement between two companies one was given the option of buying the works of the other on or before the 25th of December, for a certain sum, after having given six months' previous notice. The first company gave due notice, but was unable to complete the purchase for want of funds at the time for payment. Subsequently a second notice was given, but the second company refused to sell. *Held*, that the right of purchase was not destroyed by failure in payment at the expiration of the first notice.—*Ward* v. *Wolverhampton Waterworks Co.*, L. R. 13 Eq. 243.

2. The defendant promised to marry the plaintiff upon the death of the defendant's father, but afterwards declared that he would never do so, whereupon the plaintiff sued for breach of promise, though the defendant's father was still alive. *Held*, that there was a breach of contract, on which the plaintiff might sue.—*Frost* v. *Knight*, L. R. 7 Ex. (Ex.

Ch.) 111; s. c. L. R. 5 Ex. 322; 5 Am. Law Rev. 461; 7 C. L. J. N. S. 135.

See Broker, 2; Company; Covenant, 1; Executors and Administrators, 2; Frauds, Statute of; Good-will; Insurance, 8; Merchant; Negligence, 1; Power; Sale, 1, 2.

Contribution.—*See* General Average.

Corporation

An American company had a place of business in England and was there sued, the writ being served on the head officer of the English branch, who was not the head officer of the American corporation in the United States. *Held*, that the company could be sued in England; and that said writ was properly served. *Newby* v. *Colt's Patent Firearms Co.*, L. R. 7 Q. B. 293; s. c.

Covenant.

1. The defendant covenanted not to carry on the business of a publican within the distance of one-half a mile from the plaintiff's premises. *Held* (Cleasby, B., dissenting), that said distance was half a mile in a straight line, not half a mile by the nearest way of access to said premises.—*Mouflet* v. *Cole*, L. R. 7 Ex. 70.

2. A lessee for the lives of A., B., and C., and the survivor of them, by deed reciting his lease conveyed to the plaintiff to hold for the lives of A., B., and C., and the survivor of them, and covenanted that the said lease was a valid and subsisting lease for the lives of A., B. and C., and the survivor of them. B. was dead at the date of said covenant. *Held*, that the covenant was that the lease was valid and subsisting, not that the three lives were still in existence. The mention of the three lives were merely matter of description of the lease.—*Coates* v. *Collins*, 7 Q. B. (Ex. Ch.) 145; s. c. L. R. 6 Q. B. 469; 6 Am. Law Rev. 292.

See Lease; Railway, 1; Settlement.

Criminal Law.—*See* Evidence, 2.

Cross Remainder.—*See* Devise, 2.

Custom.—*See* Broker, 1-3.

Damages.—*See* Sheriff.

Death.—*See* Legacy, 5.

Deed.—*See* Pleading.

Demurrer.—*See* Bill in Equity; Slander.

Descent.—*See* Distribution.

Devise.

1. A testator who owned a brick-field in respect of which royalties were due, devised the field to trustees upon trust to sell it when they deemed advisable, and directed that in the rents and profits his daughter should have a life estate. The trustees retained the land to be sold at some future time for building purposes, and allowed the brick-fields to be worked out, and further royalties became due. *Held*, that the daughter was entitled to the royalties becoming payable after the testator's death, and not to interest only on the same.—*Miller* v. *Miller*, L. R. 13 Eq. 263.

2. A testator devised an estate to A. for life, and after A.'s decease to A.'s four sons (the testator's nephews), for life as tenants in common; after said nephews' decease their respective shares to their respective eldest sons then living for life; after the decease of each eldest son, his share to his first and other sons successively in tail male. In default of issue of any of the said eldest sons, his share to the second and other then living sons of said nephews successively in tail male. Failing the issue of said nephews, he devised to all the sons of said nephews "hereafter to be born, in tail male," After which the will proceeded: "And for default of such issue, I give the same to my own right heirs forever, it being my will and intention that the said lands shall go and remain in my name and family forever, or so long as the law will permit such enjoyment of the same." The oldest nephew died leaving daughters; the second died leaving no issue; and the third and fourth died leaving sons who claimed against said daughters the estate of said eldest and second nephew. *Held*, that cross remainders must be implied between the devisees and their heirs male, and that therefore the sons of the third and fourth nephews took the estate of the second nephew and of the eldest nephew to the exclusion of his daughters, who were his heirs general.—*Hannaford* v. *Hannaford*, L. R. 7 Q. B. 116.

3. A testator gave land to his wife without words of limitation, and made her executrix. He directed that if his wife should marry again, an inventory should be taken of said lands by certain persons, whom he appointed guardians of his children, with power to take away the goods, &c., and reserve them and the land for the benefit of his children until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole and divide the proceeds "equally amongst my surviving children." He also directed "my executrix" to pay his eldest son £5 a year for wages as long as he should continue to labor on the farm after testator's decease. *Held*, that the wife took the fee on the testator's decease.—*Pickwell* v. *Spencer*, L. R. 7 Ex. (Ex. Ch.) 105; s. c. L. R. 6 Ex. 190; 6 Am. Law. Rev. 86.

See Executors and Administrators, 1; Legacy; Power; Tenancy in Common; Trust; Will.

Director.—*See* Company.

Discovery.

The defendant, in a bill to restrain infringement of a trade-mark, was ordered to disclose the places to which goods were sent impressed with the alleged counterfeit mark, and the description in his books and letters of the stamp or mark to be placed on the goods referred to therein; but not the names of customers, or of persons to or from whom letters produced were written or received, or their addresses by post, or the prices of said goods. —*Carver* v. *Pinto Leite*, L. R. 7 Ch. 90.

Distress.—*See* Trespass, 1.

Distribution.

Where a fund was divisible, under the English Statute of Distributions, between grandchildren and great-grandchildren claiming by one line of descent, and grandchildren and great-grandchildren claiming by a second line, from a common ancestor, it was *held*, that the fund must be divided into moieties divisible among the descendants by each line of descent *per stirpes* and not *per capita*.—*In re Ross's Trusts*, L. R. 13 Eq. 286.

Ejectment.—*See* Landlord and Tenant, 3.

Eminent Domain.—*See* Railroad, 1.

Equity Pleading and Practice.—*See* Pleading.

Estate pur autre Vie.

A rent-charge was directed to be divided equally between A., B. and C., during their lives and the life of the longest liver. *Held*, that A. had an estate *pur autre vie*, viz., for his own life and the lives of B. and C.—*Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192; s. c. L. R. 12 Eq. 464.

Estoppel.—*See* Sheriff.

Evidence.

1. A prosecutrix, in an indictment for an indecent assault amounting to an attempt at rape, if asked on cross-examination whether she has had connection with a person other than the prisoner, cannot be contradicted.—*Reg.* v. *Holmes*, L. R. 1 C. C. 334.

2. Where two prisoners are indicted and tried together, one is not a competent witness for the other.—*Reg.* v. *Payne*, L. R. 1 C. C. 349, 8 S. C. L. J. N. S. 109.

See Broker, 2; Frauds, Statute of, 2; Legacy, 5; Patent.

Examination.—*See* Evidence, 1.

Execution.—*See* Bankruptcy, 8.

Executors and Administrators.

1. A bank opened an account with F.'s executrix, entitling it "F.'s executors' account," and advanced money to her on the security of title-deeds of F.'s estate, deposited by her. F.'s executors were empowered to charge his real estate in favour of his personal estate. The executrix expended the above money for her own purposes, but the bank had no notice that the money was not desired for or applied to proper purposes. *Held*, that the bank could not prove against the general estate of the testator for a balance remaining unpaid after realizing the security.—*Farhall* v. *Farhall*, L. R. 7 Ch. 123; s. c. L. R. 12 Eq. 98; 6 Am. Law Rev. 295.

2. The executor of an executrix *de son tort* is not liable for a breach of contract of the executrix's testator.—*Wilson* v. *Hodson*, L. R. 7 Ex. 84.

See Devise, 3; Legacy, 1, 2.

Foreign Corporation.—*See* Corporation.

Forgery.—*See* Bills and Notes, 3.

Fraud.—*See* Company, 7.

Frauds, Statute of.

1. Bill for specific performance of a verbal agreement. The defendant wrote a letter agreeing to hire a house for seven years, not stating when the term was to begin. In a subsequent letter he referred to the first, adding that he understood that on his taking a lease from Michaelmas the lessor was to perform certain stipulations stated, which the plaintiff denied to be in the original verbal agreement. *Held*, that there was no memorandum of an agreement sufficient to satisfy the Statute of Frauds.—*Nesham* v. *Selby*, L. R. 13 Eq. 191.

2. The defendant being chairman of a local board of health, asked the plaintiff whether he would lay certain pipes. The plaintiff said, "I have no objection to do the work, if you or the board will order the work or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid;" and accordingly the plaintiff did the work. The work was not authorized by the board, and they refused to pay for it *Held*, that the defendant was liable for the price of the work, as there was evidence for the jury that the defendant contracted to be primarily liable.—*Mountstephen* v. *Lakeman*, L. R. 7 Q. B. (Ex. Ch.) 196; s. c. L. R. 5 Q. B. 613; 5 Am. Law Rev. 466.

General Average.

A vessel sailed from Melbourne for London being provided with a donkey engine adapted for hoisting sails, pumping the vessel, &c., and supplying the place of an additional crew of ten men. There was on board coal sufficient for an ordinary voyage. The vessel encoun-

tered a cyclone, and was so strained that the engine had to be kept constantly pumping; in consequence of which, when the supply of coal had nearly given out, the master cut up extra spars and mixed them with the coal, enabling the engine to keep working until an extra supply of coal was obtained. There was no sudden emergency, rendering the use of spars necessary, but without working the engine the vessel would have sunk. *Held* (by Kelly, C. B, Bramwell, B.; Martin and Cleasby *contra*), that there was an emergency sufficiently imminent to render the destruction of the spars a case for general average. Also (by the whole court), that there was no case for contribution in respect to the extra coal.—*Harrison* v. *Bank of Australia*, L. R. 7 Ex. 39.

Good-will.

The defendant, who had sold the good-will of a business to the plaintiff, began business again, giving out that the same was a continuation of his former business, and soliciting his former customers for orders. *Held*, that the defendant was entitled to publish any advertisement or circular to the world at large announcing that he was carrying on said business, but was not entitled by private letter, or by a visit, or by his agent, to solicit a customer of the old firm to transfer his custom to him, the new firm.—*Labouchere* v. *Dawson*, L. R. 13 Eq. 322.

House.—*See* Building.

Husband and Wife.

J. desired to obtain money to pay a certain debt, and J.'s wife desired money to repair certain property of her own. By advice of a solicitor, the defendant, an advance payable by instalments was procured on a mortgage of the wife's separate property, executed by husband and wife, and upon two policies of insurance on the life of J. and his wife respectively. In said mortgage the husband covenanted for repayment of the loan to the mortgagees. The defendant, under written authority of J. and his wife, received the first instalment and paid said debt of J., and claimed to retain the balance in his hands in satisfaction of a debt due from the husband for professional charges for business before done. *Held*, that said advance was raised in part to pay said debt of J., and the remainder for the separate use of the wife, and that the money advanced had not been reduced to possession by J. The defendant, therefore, had no right to retain the same.—*Jones* v. *Cuthbertson*, L. R. 7 Q. B. 218.

See Slander.

Indecent Assault.—*See* Evidence, 1.

Indictment.—*See* Evidence, 2.

Injunction.

An injunction to restrain a railway company from running trains over land ordered to be sold in satisfaction of a lien was refused.—*Lysett* v. *Stafford and Uttoxeter Railway Co.*, L. R. 13 Eq. 261.

See Patent.

Insurance.

1. Action on a policy of insurance on a voyage, touching at a certain port. The master of the vessel had written of said port, "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe;" and the insured showed the letter to the insurer. Both insured and insurer were ignorant of the character of the port. The conduct of the insured and said master was *bonâ fide*. In fact, said port was dangerous during "the hurricane months," and the vessel was there destroyed by a storm. *Held*, that the statements in said letter being only of matter of opinion, there was no misrepresentation.—*Anderson* v. *Pacific Fire and Marine Insurance Co.*, L. R. 7 C. P. 65.

2. The plaintiffs, who were lightermen on the Thames, effected a policy for the sum of £2,000, "to cover and include all losses, damages and accidents amounting to £20 and upwards, in each craft, to goods carried by [the plaintiffs] as lightermen, or delivered to them to be waterborne, either in their own or other craft, and from which losses, damages and accidents [the plaintiffs] may be liable or responsible to the owners thereof, or others interested." This policy was subscribed by different underwriters, the defendant underwriting for £100. Goods were lost to the value of £1,100, the total value of the plaintiffs' risks covered by the policy being £20,000. The defendant contended that he was only liable for such a proportion of the loss as 100 bore to 2000. *Held*, that the plaintiffs were entitled to be indemnified for the loss actually sustained, viz., £1,100, and to recover £55 from the defendant as his proportion of the loss.—*Joyce* v. *Kennard*, L. R. 7 Q. B. 78.

3. An insurance company made a memorandum of the terms upon which a policy was to be issued to the plaintiff, which, though not enforceable at law or equity, is, according to the customs of insurers, the complete and final contract. After making the memorandum, and before a policy was made out, material facts came to the knowledge of the plaintiff, and were not disclosed by him. *Held*, that the

policy was not avoided.—*Corey* v. *Patton*, L. R. 7 Q. B. 304.

See Bankruptcy, 1.

Interrogatories.—*See* Bill in Equity; Landlord and Tenant, 3.

Joint Tenancy.—*See* Tenancy in Common.

Landlord and Tenant.

1. The plaintiff, a lessee, by agreement not under seal, assigned his interest in the property to the defendant, who accordingly entered into occupation of the premises, but the assent of the lessor, necessary to the assignment, was never obtained. The defendant paid rent to the lessor for the plaintiff, taking receipts made out to the latter. At Michaelmas, 1870, the defendant quitted the farm, having given said lessor, but not the plaintiff, notice to quit. If the defendant had wished, he could have occupied until March 1, 1871, but the premises were left vacant until said day, when the plaintiff paid the lessor £40 rent, which he sought to recover, either on an implied indemnity or as rent due from the defendant as his tenant, or for constructive use and occupation. *Held*, that the plaintiff was not entitled to recover.—*Crouch* v. *Tregonning*, L. R. 7 Ex. 88.

2. The appellants owned a building divided into different suites of rooms, distinct from each other, and occupied separately as residences or offices. The suites were let by agreement, containing the following terms: The lessee agrees to pay rent quarterly, to keep the premises in repair, and to deliver up possession at the end of the tenancy; the lessors agree to pay all rates and taxes; they are to have liberty to enter for the purpose of painting the outside wood and iron work. In case of non-payment of rent or breach of covenant by the lessee, the lessors may, without notice, re-enter and resume possession of the premises. Each entrance of the building is to be in charge of a resident porter appointed by the lessors; the porter has a duplicate key to the outer door of every suite of rooms, and his general duties, for which there is no charge to the lessee, are to clean the stairs, to deliver to the lessee all letters, parcels and messages, and to receive the keys of the outer doors of the suites from the lessee on his leaving at night. *Held*, that each suite was occupied by the tenant, and that the lessor had parted with possession of the premises, including the outer doors of the building. The tenants were not merely inmates or lodgers under the lessor.—*The Queen* v. *St. George's Union*, L. R. 7 Q. B. 90.

3. A tenant holding over after expiration of his lease cannot, in an action of ejectment, be allowed to put interrogatories to the lessor asking whether the latter's title has expired.—*Wallen* v. *Forrestt*, L. R. 7 Q. B. 239.

See Bankruptcy, 5; Frauds, Statute of, 1; Railway, 1; Trespass, 1.

Larceny.

The prisoner, whose goods were in the hands of a bailiff under a warrant of execution, forcibly took the warrant from the bailiff, thinking to deprive him of his authority. *Held*, that the prisoner was not guilty of larceny, but of taking for a fraudulent purpose.—*Reg.* v. *Bailey*, L. R. 1 C. C. 347.

Lease.

The plaintiff, a lessee, assigned his estate to B., who covenanted to indemnify against subsequent breaches. B. assigned to the defendant, who covenanted in like manner. The defendant committed a breach, the lessor recovered from the plaintiff, and he sued the defendant. *Held*, that the plaintiff was entitled to recover.—*Moule* v. *Garret*, 7 Ex. (Ex. Ch.) 101; s. c. L. R. 5 Ex. 132; 4 Am. Law Rev. 700.

See Covenant; Frauds, Statute of, 1; Landlord and Tenant; Railway, 1.

Legacy.

1. A testator gave a legacy to an infant chargeable upon certain real estate in case the personal estate was inadequate. The personal estate was sufficient at the time of the testator's death, but was subsequently wasted by his personal representative. *Held*, that the legacy was not chargeable upon said real estate upon the infant attaining twenty-one.—*Richardson* v. *Morton*, L. R. 13 Eq. 123.

2. A testator appointed A. and the testator's "friend" B. executors of his will, and gave each a legacy of £1000 "as a remembrance." B. never acted as executor. *Held*, that B. was entitled to the legacy without proving the will.—*Bubb* v. *Yelverton*, L. R. 13 Eq. 131.

3. A testator gave, devised, and bequeathed to his trustees, their heirs, executors and administrators, all his estate and effects upon trust to convert his personal estate into money, and hold the same upon certain trusts. *Held*, that the testator's real estate passed to the trustees under the will, but that the trusts in the will applying only to the personal estate, the beneficial interest in the real estate resulted to the testator's heir.—*Longley* v. *Longley*, L. R. 13 Eq. 133.

4. A testator made a certain provision for his nephew, and then added that for making a further provision for his nephew it should be lawful for the testator's trustees to expend a

certain sum in the purchase of any commission, or in obtaining the promotion of said nephew in the army. The purchase of commissions was abolished by royal warrant before payment of said legacy. *Held*, that said nephew was entitled to the sum named, as a legacy.—*Palmer* v. *Flower*, L. R. 13 Eq. 250.

5. By will, dated October 4, 1845, a testator bequeathed to the children of A., who should be living at the testator's death, £1000, to be raised out of a life estate bequeathed to B. A. had five children, one of whom had gone to the United States and had not been heard from since February 17, 1845. The testator died, and B. was found lunatic in 1852, her estate being transferred to the account of "B. and the children of A." Four-fifths of said £1000 were divided among said four children, who in 1871 petitioned that the remaining fifth be divided. *Held*, that there being no evidence that said fifth child was living at the testator's death, the fifth was divisible among said four children; and also, that the title of account under which stood B.'s estate, showed that the children were interested in the same, and prevented their losing title under the statute of limitations; but that interest on said fifth could be claimed for six years only.—*In re Walker*, L. R. 7 Ch. 120.

6. In 1868 a testatrix bequeathed a sum to the treasurer for the time being of the fund for the relief of the clergy of the diocese of W. Said diocese in 1868 included the archdeaconries of W. and C., but until 1837 included only the archdeaconry of W. Until 1837 there was a society of the diocese for the above purpose, and this society, when the diocese was enlarged, was restricted to the archdeaconry of W. There was a similar society in the archdeaconry of C. The testatrix and her parents had contributed to the society in the archdeaconry of W., but not to the other society. *Held*, that the sum must be paid to the W. society.—*In re Kilvert's Trusts*, L. R. 7 Ch. 170; s. c. L. R. 12 Eq. 183; 6 Am. Law Rev. 298.

See Devise; Power; Tenancy in Common; Trust; Will.

Letter.—*See* Company, 2.

Libel.—*See* Slander.

Lien.—*See* Injunction.

Limitation, Statute of.—*See* Bills and Notes, 1; Legacy, 5.

Lodging.—*See* Landlord and Tenant, 2.

Marriage.—*See* Contract.

Marriage Settlement.—*See* Settlement.

Marshalling Assets.

A. effected policies of insurance upon his life, and mortgaged the same for sums borrowed. B. became surety for the payment of the amount borrowed upon a policy. A. died bankrupt, and B. paid the amount for which he was surety. *Held*, that B. was entitled to have the moneys payable upon the different policies marshalled so as to be repaid the sum he had paid as surety. Also, that a payment by A.'s wife out of separate estate was no exoneration of the balance of the policy moneys.—*Heyman* v. *Dubois*, L. R. 13 Eq. 158.

See Priority.

Master.—*See* Ship.

Merchant.

The defendant gave a bond conditioned not to "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise." The defendant became traveller and collector for a brewer. *Held*, that there was no breach of the condition.—*Josseleyn* v. *Parson*, L. R. 7 Ex. 127.

Mortgage.

The mortgagees of a policy of insurance mortgaged by a deceased testator to secure a certain sum, received under the policy an amount sufficient to repay said sum and leave a balance. The testator's estate was insolvent. *Held*, that the mortgagees might retain said balance in discharge of other debts due from the testator.—*In re Haselfoot's Estate: Chaumtler's Claim*, L. R. 13 Eq. 327.

Motion.—*See* Bill in Equity.

Navigation.—*See* Trespass, 2.

Negligence.

1. Defendant, in pursuance of a contract, laid down a gas-pipe from the main to a metre in the plaintiff's shop. Gas escaped from a defect existing in the pipe when laid, and the servant of a gas-fitter employed by the plaintiff went into the shop to find out the cause, carrying a lighted candle. The jury found that this was negligence on the servant's part. The escaped gas exploded and damaged the shop. *Held*, that the defendant was liable, and was not exonerated by the negligence of said servant.—*Burrows* v. *March Gas and Coke Co.*, L. R. 7 Ex. (Ex. Ch.) 96; s. c. L. R. 5 Ex. 67; 4 Am. Law Rev. 713.

2. The defendants were a canal company, and the plaintiff proprietor of a coal-mine under part of the bed of the canal. Said company was authorized by statute to take land for the canal, the minerals in the land being reserved to the owners thereof subject to a proviso that in working the same no injury should be done to the navigation. It was also

provided that a mine-owner wishing to work his mine should give certain notice to the company, which should then inspect the mine and consent or refuse to allow the same to be worked; in the latter event paying the market price for the same. If the company should omit to give or refuse such consent, the mine-owner might work the mine. The plaintiff gave proper notice, but the defendants did not inspect, and refused to purchase the mine. The plaintiff worked the mine without regard to the surface, without knowledge that the effect would be to let down the surface and probably dislocate the slate and admit water, but otherwise were not negligent or unskilful, but took coal in the ordinary manner, and could not otherwise have obtained full benefit of the mine. Consequently, with negligence of the defendants, water entered the mine. The plaintiff brought an action of tort, charging negligent management of the canal whereby the water escaped to the damage of the mine. *Held* (Hannen, J., dissenting), that the action could not be maintained. *It seems*, that the plaintiff could recover compensation for the loss of the coal under said statute.—*Dunn* v. *Birmingham Canal Co.*, L. R. 7 Q. B. 244.

See Bailment.

Notice.—*See* Company, 6; Contract, 1.

Obstruction.—*See* Trespass, 2.

Office.—*See* Larceny.

Parties.—*See* Will, 2.

Partnership.—*See* Bankruptcy, 4; Company, 1.

Patent.

The plaintiff in 1871 purchased lamp burners manufactured under an American patent dated 1859. The defendants were holders of an English patent dated 1865 for a similar burner, and after the plaintiff had offered his burners for sale, published a notice that they were informed of an infringement being made in America for sale in England, and that on the sale of said burners made in infringement, legal proceedings would be at once instituted. It appeared that the notice was not *bonâ fide*. *Held*, that the plaintiff should be enjoined from publishing said notice. There is no presumption in favor of a new patent, and parties cannot, under its colorable protection, issue circulars intimidating the public and injuring the trades of others.—*Rollins* v. *Hinks*, L. R. 13 Eq. 355.

See Discovery.

Payment.—*See* Company, 4.

Pleading.

Averment in a bill in equity that an indenture was executed between A. and B., and the several other persons whose names and seals were, or were intended to be, thereunto subscribed and set (being respectively creditors of A.). *Held*, no sufficient averment of execution by creditors.—*Glegg* v. *Rees*, L. R. 7 Ch. 71.

See Slander.

Possession.—*See* Husband and Wife; Landlord and Tenant, 2; Settlement; Trespass, 1.

Power.

1. A testatrix gave certain real estate to her husband in trust to stand possessed thereof and enjoy the rents arising therefrom for his own use during his life, with power to take and apply the whole or any part of the capital arising therefrom to his own use; and after his decease, over. *Held*, that the husband took a life estate, with power of acquiring the entire interest in the estate; and that in default of such appointment the gift over took effect.—*Pennock* v. *Pennock*, L. R. 13 Eq. 144.

2. A. having under her husband's will a general power of appointment over residuary estate, directed in her will, of which she appointed an executor, that her debts should be paid, gave three legacies, and bequeathed the residue of the personal estate in which she had any interest or title to four persons as tenants in common, two of whom died before the testatrix. *Held*, that the shares of the two persons dying went to the personal representatives of A.'s husband.—*In re Davies' Trusts*, L. R. 13 Eq. 163.

Practice.—*See* Corporation.

Principal and Agent.—*See* Broker, 1-3; Negligence, 1.

Principal and Surety.—*See* Bills and Notes, 2, 3.

Priority.

A. discounted a bill for the defendant, who charged a certain fund for the same and for any further sum advanced, or for which the defendant might be liable to A. Subsequent advances to the defendant were made by other parties, and charged against said fund without A.'s knowledge. After these advances the defendant accepted a new bill payable to A for the amount of the bill discounted by A. with interest and costs; A. also made a further advance to the defendant; and finally a bill accepted by the latter was indorsed to A. The said fund became distributable at a bank, Dec. 8. One creditor served notice of his charge at half-past five p.m., Dec. 7, and the other creditors as soon as the bank opened on Dec. 8. *Held*, that notice of all said charges was at the same time; that the first charge was in favor of A. for the bill payable to him, and for his second advance, but did not cover the bill endorsed to him, which did not come

with the terms of the charge. — *Calisher* v *Forbes*, L. R. 7 Ch. 109.

Probate.—*See* Will, 2.

Promissory Note.—*See* Bills and Notes.

Proof.

Bills drawn by the A. bank upon the B. bank were accepted for the accommodation of the A. bank upon the understanding that funds would be furnished to meet them. The bills were discounted by C., but before they matured both said banks suspended payment. C. proved against both banks and recovered a dividend from both. *Held*, that the B. bank could not prove against the A. bank for the amount it had paid to C.—*In re Oriental Commercial Bank*, L. R. 7 Ch. 99; s. c. L. R. 12 Eq. 501; 6 Am. Law Rev. 492.

See Executors and Administrators, 1.

Railway.

1. A railway company gave the plaintiff notice that it would require his leasehold premises, and subsequently entered into possession and paid for the same. *Held*, that the plaintiff was entitled to a decree that the company should accept an assignment of the lease and engage to indemnify the plaintiff against the rent and the covenants in the lease.—*Harding* v. *Metropolitan Railway Co.*, L. R. 7 Ch. 154.

2. A railway company was empowered by statute to extend its line and raise money by the issue of so-called extension shares; said extension to form, for financial purposes, a separate undertaking, and its capital and shares a separate capital; its profits to pay its dividends and the holder of its shares to have no dividend from the other profits of the company; and the company to keep separate accounts of the extension. The company might raise an additional sum by mortgage, but not until all the extension capital was subscribed for and half paid up; such sum to be applied only to the purposes of said act. A creditor, to whom the company was indebted for construction of the original line, obtained judgment and execution under which land obtained under the extension act was seized. *Held*, that the creditor was entitled to an order of sale of said land.—*In re Ogilvie*, L. R. 7 Ch. 174.

See Bailment; Injunction.

Remainder.—*See* Devise, 2; Settlement.

Rent-charge.—*See* Estate pur autre Vie.

Rents and Profits.—*See* Devise, 1.

Return.—*See* Sheriff.

Sale.

1. The plaintiffs agreed to ship a cargo of ice to the United Kingdom, "forwarding bills of lading to the purchaser, and upon receipt thereof the purchaser takes upon himself all risks and dangers of the seas;" and the defendant agreed to buy and receive the ice on its arrival and pay for it in cash on delivery. The vessel was lost by dangers of the seas after the defendant had received the bills of lading. *Held*, that the defendant was liable for the value of the ice.—*Castle* v. *Playford*, L. R. 7 Ex. (Ex. Ch.) 98; s. c. L. R. 5 Ex. 165; 5 Am Law Rev. 63.

2. The defendants' agents in Valparaiso purchased for them a cargo of soda, and chartered the P. to bring it to England; the soda was soon after destroyed by an earthquake, and the agents thereupon cancelled the charter. After the defendants, being ignorant of the destruction, sold to the plaintiff the soda, "being the entire parcel of nitrate of soda expected to arrive at port of call per P. Should any circumstance or accident prevent the shipment of the nitrate, this contract to be void." The defendants' agents upon hearing of this contract bought another cargo of soda and shipped it by the P. to England. *Held*, that the plaintiff had no claim to the soda, not being the specific quantity contracted for.—*Smith* v. *Myers*, L. R. 7 Q. B. (Ex. Ch.) 139; s. c. L. R. 5 Q. B. 429; 5 Am. Law Rev. 301.

See Bankruptcy, 8; Contract, 1; Goodwill; Injunction; Railway, 2; Sale, 2.

Security.—*See* Executors and Administrators, 1.

Service of Writ.—*See* Corporation.

Settlement.

Two marriage settlements contained covenants by the husband and wife that if at any time after the marriage and during their joint lives, they or either of them in her right should by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate to the value of £100, the same should be conveyed, transferred, assured, and paid to trustees. In the first case certain remainder vested in the wife before marriage, vested in possession. In the second case the wife died before a vested remainder vested in possession. *Held*, that "entitled" in said covenant signified "entitled in possession," and that in said first case the trustees were entitled to the fund; otherwise in the second case.—*In re Clinton's Trust: Holway's Fund*, L. R. 13 Eq. 295.

Shareholder.—*See* Company.

Sheriff.

A sheriff seized goods under a *fi. fa.*, and remained in possession until dismissed by the plaintiff, and made return that he had seized the debtor's goods and held them until ordered to withdraw by the plaintiff. The goods seized

had been assigned prior to the seizure by a valid bill of sale. To an action for not levying under the writ, and for a false return, the sheriff pleaded *nulla bona*. *Held*, that the sheriff was not estopped by his return from proving that the goods seized did not belong to the debtor, and that an action for a false return would not lie unless actual damage had been caused to the plaintiff.—*Stimson* v. *Farnham*, L. R. 7 Q. B. 175.

Ship.

Beans were shipped by the plaintiffs on the defendant's vessel to be carried under a bill of lading from Alexandria to Glasgow. At Liverpool the vessel was damaged by a collision (a peril excepted in the bill of lading) and the beans were saturated with salt-water. The vessel put into Liverpool, was repaired, and proceeded to Glasgow without drying the beans, which in consequence fermented and were much damaged. The beans might have been taken from the vessel, dried, and carried to Glasgow, and the shippers so requested, offering, also, to receive them at Liverpool, paying freight *pro rata*. If dried and reshipped the expense would have been particular average, payable by the shipper. Such drying and reshipping would have been reasonable and proper, if there was a legal duty on the master so to do. *Held*, that under the circumstances of the case it was the master's duty to dry and re-ship the beans, and that the shipowners were therefore liable.—*Notara* v. *Henderson*, L. R. 7 Q. B. (Ex. Ch.) 225; s. c. L. R. 5 Q. B. 346; 5 Am. Law Rev. 79.

See General Average; Insurance; Trespass, 2.

Slander.

Action for slander in imputing adultery to the plaintiff whereby she was injured in her character and reputation, and became alienated from and deprived of the cohabitation of her husband, and lost and was deprived of the companionship and ceased to receive the hospitality of divers friends. On demurrer, *held*, that the alleged loss of hospitality was sufficient to sustain the declaration, and was such a consequence as might reasonably and naturally be expected to follow the use of such slanderous words. Also, that the real damage was to the wife, and would sustain an action by husband and wife.—*Davies* v. *Solomon*, L. R. 7 Q.B. 112.

Special Property.—*See* Trespass, 1.

Statute.—*See* Negligence, 2.

Statute of Distributions.—*See* Distribution.

Statute of Frauds.—*See* Frauds, Statute of

Statute of Limitations.—*See* Limitations, Statute of.

Stock Exchange.—*See* Broker, 1.

Surety.—*See* Bills and Notes, 2, 3.

Tenancy in Common.

A testatrix bequeathed a fund to her nephews and nieces to be divided among them *per stirpes*, the children of a deceased niece "taking between them only the equal share to which the said" niece would have been entitled. *Held*, that said children of the deceased niece took as tenants in common.—*Attorney-General* v. *Fletcher*, L. R. 13 Eq. 128.

Tillage.

In case any part of certain land was converted into "tillage," a tithe rent-charge became due. The owner of the land built a house thereon, and converted a part into garden ground, the remainder being orchard. *Held*, that the land was not converted into tillage, which is land used for agricultural purposes.—*Vigar* v. *Dudman*, L. R. 7 C. P. (Ex. Ch.) 72; s. c. L. R. 6 C. P. 470; 6 Am. Law Rev. 304.

Tithe.—*See* Tillage.

Trader.—*See* Bankruptcy, 3; Good-will.

Trade-mark.—*See* Discovery.

Trespass.

1. Action for an excessive distress for rent. The property distrained had been assigned to trustees in trust for the plaintiff's wife, but was left in the plaintiff's house and enjoyed by him. *Held*, that though the plaintiff was not the legal owner of the property, yet as he had a right of possession by consent of his wife and the trustee, he could maintain the action. *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.

2. The plaintiff owned the soil under a lake open to public navigation. The defendant built from his land, bordering upon the lake, a pier running into the lake and supported by piles driven into the plaintiff's land. The plaintiff brought trespass against the defendant for causing people to pass and repass over said pier to and from the defendant's steamboats. *Held*, that the plaintiff must be considered to have claimed the pier as being built upon his own soil, and therefore was in the position of maintaining the pier to the obstruction of navigation, and that passing over the pier was therefore justifiable.—*Marshall* v. *Ulleswater Co.*, L. R. 7 Q. B. 166.

Trust.

1. A testator directed the trustees under his will to sell his freehold estate at L. and his personal estate, immediately after his decease, or so soon thereafter as they should see fit to do. The personal estate included shares

in an unlimited banking company, considered by the testator and the trustees to be perfectly safe. The trustees held the shares two years and a quarter when the bank failed. R., one of the trustees, was a minor at the death of the testator, and attained majority nine months before said failure. *Held*, that the trustees, including R., should have sold said shares within a reasonable time, or one year from the testator's death, and were liable to make up the loss to the *cestuis que trust*.—*Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232.

2. A testator who was a tenant from year to year of an estate, desired his trustees to give up the tenancy of the plaintiff if the landlord would accept him as a tenant; if so accepted, the plaintiff to have the farming stock. The testator's assets were insufficient to pay legacies if the plaintiff received said stock. The trustees represented these facts to the landlord, and accordingly by advice of the trustees the plaintiff was refused as a tenant unless he should first convey certain other estates to the trustees for payment of said legacies. The plaintiff executed deeds accordingly. *Held*, that said deeds were obtained by a breach of trust, and must be set aside; and that the trustees must pay all costs.—*Ellis* v. *Barker*, L. R. 7 Ch. 104.

See Devise, 1; Legacy, 3; Trespass, 1.

Undertaking for Payment of Money.—*See* Bills and Notes, 3.

Usage.—*See* Broker, 2, 3.

Use and Occupation.—*See* Landlord and Tenant, 1.

Vendor and Purchaser.—*See* Contract, 1.

Warrant.—*See* Larceny.

Will.

1. By statute a devise to a person whose wife attests the will is null and void. Testatrix devised to A., and A.'s wife was an attesting witness. By a codicil, properly attested, the testatrix confirmed her will. *Held*, that the devise to A. was rendered valid.—*Anderson* v. *Anderson*, L. R. 13 Eq. 381.

2. The plaintiff, who had been cognizant of a previous suit contesting the validity of a will, but compromised without his knowledge, was *held* not barred by the decree founded on said compromise from bringing suit of revocation of probate.—*Wytcherley* v. *Andrews*, L. R. 2 P. D. 327.

See Executors and Administrators, 1; Legacy; Power; Tenancy in Common; Trust.

Witness.—*See* Evidence.

Writ.—*See* Corporation.

Words.

"*Between.*"—*See* Tenancy in Common.

"*Building.*"—*See* Building.

"*Due.*"—*See* Bankruptcy, 2.

"*Entitled.*"—*See* Settlement.

"*Porter, Ale, or Spirit Merchant.*"—*See* Merchant.

"*Tillage.*"—*See* Tillage.

REVIEWS.

The Law and Practice of Injunctions in Equity and at the Common Law. By William Joyce, Esq., of Lincoln's Inn, Barrister-at-Law. London: Stevens and Haynes, Law Publishers, Bell Yard, Temple Bar, 1872. In two volumes, royal 8vo. Price 70 shillings, cloth.

This work, considered either as to its matter or manner of execution, is no ordinary work. It is a complete and exhaustive treatise, both as to the law and the practice of granting injunctions. It must supersede all other works on the subject. Of late years the remedial power of granting injunctions has been very frequently and very widely exercised, and now that its exercise is not restricted to Courts of Equity, the members of both branches of the profession are interested in understanding it.

The author, after referring briefly to the well understood definition of an injunction, divides his work into four parts—the first treating of injunctions to stay wrongful acts of a special nature, not being proceedings in other courts; the second, of injunctions to stay proceedings in courts at law and other courts; the third, the practice as to injunctions; and the fourth, injunctions at common law.

The chapters in the first part (injunctions to stay wrongful acts of a special nature, not being proceedings in other courts) are headed real property (including leaseholds), personal property, incidents of property (real and personal), persons and relating to persons, corporations, quasi corporations, friendly and benefit societies, ecclesiastical matters, burial grounds, companies (railway and other public companies), jurisdiction, and injunctions generally.

The chapters in the second part (injunctions to stay proceedings in courts of law and other courts) are headed—jurisdiction, real

property (including leaseholds), personal property, incidents of property (real and personal), persons and relating to persons, corporations, companies, and injunctions generally.

The chapters in the third part (practice) are headed—by what means an injunction is obtained, by what means dissolved, what is done on the motion to dissolve, who may apply to dissolve and before whom the application should be made, evidence on the motion and form of the order to dissolve, filing the bill, service of the bill, service of notice of motion for an injunction, form of notice of motion, and of notice of the time of making the motion, the time for and order and form of making the motion, evidence on the motion, the effect of pleadings and of changes in the pleadings, dismissal of the bill, orders and injunctions obtained on interlocutory applications, interim restraining orders and injunctions and interlocutory injunctions, drawing up and service of, the notice of and minutes and orders for an injunction, and preparation and issuing and service of the writ of, and order for an injunction, the injunction made at the hearing of the cause, appeals, breach of injunction, practice on injunctions generally.

The chapters in the fourth part (injunctions at common law) are headed — injunctions under the Patent Law Amendment Act, 1852, injunctions under the Railway and Canal Traffic Act, 1854, injunctions under the Common Law Procedure Act, 1854, staying proceedings under the Common Law Procedure Act, 1852, and practice of injunctions at common law.

The first two parts, embracing no less than 1,253 pages, form an able and exhaustive exposition of the law as to injunctions generally in Courts of Equity and Law. The third part, containing less than 100 pages, is the part that will be most valued by members of the profession in active practice. There is a great difference between the law and its administration. A man may be a good lawyer, as far as mere knowledge of the principles of law are concerned, and yet know nothing of the practice of the law. But as most men who become members of the profession, in the colonies at all events, do so to acquire a livelihood, mere knowledge of the law without some knowledge of its mode of administration is of little value. The practical man will more frequently refer to the third than to any other part of this great work, and his references will seldom be in vain. The terse statement of the practice regulating the granting, dissolution, and punishment for breach of injunctions will be found, to such an one, of incalculable value; and, as the practice varies from year to year, this recent exposition of it will be the more eagerly sought for. Whenever a future edition of the work becomes necessary, it might be advisable to insert a chapter as to costs in injunction cases, though, of course, costs in general follow the result.

The common law practitioner will be only too glad to refer to the fourth part, as to injunctions at common law. Though courts of common law in this Province have, since 1856, had power to issue writs of injunction, the power is seldom invoked. One reason, no doubt, is that the judges of the common law courts, here and in England, in their construction of the act, greatly curtailed its intended operation. But another reason is, that the law of injunctions is little understood by members of the common law bar. If better understood, we are confident that there would be in many cases, an effort made to compel the court, in which an action for a continuing wrong is instituted, to do complete and final justice between the parties. This was the object of the Common Law Commissioners who recommended the change in the law, and of the Legislature who gave effect to their recommendation. We know of no book as suitable to supply a knowledge of the law injunctions to our Common Law friends as Mr. Joyce's exhaustive work. It is alike indispensable to members of the Common Law and Equity bars.

We cannot conclude without making some remarks as to the manner in which the work has been written. The author has been careful not to lay down propositions beyond the authority of the decided cases to which he refers. It is not always that the *dictum* of a text writer is supported by the cases on which he relies. Some of the best of English text writers are open to this charge. We do not mean to say that it is always the result of want of proper care. Judges who have all the advantages of argument by opposing counsel before deliberation, and generally of consultation before decision, sometimes take wrong views of cases. The text writer who

draws his conclusions without any of these advantages, is not less likely occasionally to err. But we observe on the part of Mr. Joyce an anxious desire "to keep within bounds." This is the more manifest from the fact that whenever he can, he gives the very words of the judge, and not his own understanding of what the judge said. His industry in the examination of cases is very great. He tells us in his preface that every case in the English Courts of Equity, where an injunction has formed any material portion of the relief asked for, has been noticed. Besides he has laid under tribute the cases on the subject of injunctions at Common Law—cases on injunctions in the House of Lords, including the Scotch cases of interdict, cases in the Privy Council and in the Irish Courts, together with a selection of American cases.

Mr. Joyce might have gone further, and made a selection from the many important cases decided by our Court of Chancery, which, for learning, will compare favourably with his selections from the Irish and United States Courts. Our reports are to be found in the library of the Middle Temple, and, if we mistake not, also in the library of Lincoln's Inn. We would advise English law authors, who write upon subjects of as much interest in the colonies as at home, to extend the field of their explorations beyond United States jurisprudence. Our decisions are, of course, not binding on courts in England; no more are United States decisions. But all are equally useful and equally valuable to the author whose aim is to expound the law of England, as best understood where it is administered. The profession in England have very little idea of the learning that adorns the Bench in some of our Colonies, and the sooner they overcome the notion that there is nothing good in the Colonies the better for themselves and for the colonists. When we find continued references to the decisions of United States Courts and no reference to the decisions of our Courts, where, to say the least, equal learning, equal ability, and equal judgment are to be found, we become somewhat nettled. Recently we have seen references to Canadian authorities in text books written by United States authors. It is full time that our English brethren should wake up to our existence. We want English authors to understand that there is such a country as Canada. We want them to know that in Canada there are men who, though colonists, would do honour to the bench of the mother country, and we do not want English authors, when preparing works on branches of English jurisprudence, either to forget us or our decided cases. If we mistake not, Messrs. Stevens and Haynes, the publishers of the work now under review, could impart some knowledge, as to the status of the profession in Canada, that would astonish some people in London, who never having gone beyond the limits of Britain, drowsily imagine that there is nothing good in the Colonies.

We do not intend by these remarks in any manner to censure Mr. Joyce. He has done just what all English law authors before him have done, written only for England, unmindful of the fact that in Canada, whose jurisprudence is as nearly as possible the same as that of the mother country, decisions may be found as deserving of notice as Scotch, Irish, or United States decisions. It is time that, in this respect, there should be a change, and colonists will hail with pleasure an author who will treat us as deserving of as much consideration as foreigners.

Mr. Joyce's great work would be a casket without a key unless accompanied by a good index. His index to injunctions in equity is very full and well arranged. The same may be said of his index to injunctions at common law. We do not know why there are two indexes. One general index would, we think, be better. There must be a great deal of the work common alike to courts of law and equity. The division of the index has a tendency to throw the enquirer off his guard and in a future edition we would strongly recommend the author to consolidate them. Each index while alphabetical is, to a great extent, analytical, and in each the headings sub-headings, &c., are so arranged as to readily catch the eye. The two indexes together occupy no less than 180 pages. Besides, there is a table of cases (numbering 3,500) which occupies 50 pages.

We feel that this work is destined to take its place as a standard text book, and *the* text book on the particular subject of which it treats. The author deserves great credit for the very great labour bestowed upon it. The publishers, as usual, have acquitted

themselves in a manner deserving of the high reputation which they bear as the leading law publishing firm of Great Britain.

The Principles of Equity, intended for the use of students and the profession. By the late Edmund Henry Turner Snell, of the Middle Temple, Barrister-at-Law. The Second Edition, by J. R. Griffith, Esq., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1872. In 8 vo., 583 pages.

This book is now so well known to the profession and to law students in Canada as to require little notice at our hands. All will welcome the second edition, and yet receive it with regret at the accompanying announcement that its able author is no more.

When the first edition was published in 1868, we were greatly pleased with it. We admired the arrangement of the work, and the author's treatment of the different parts into which the work was divided. The idea of the work first occurred to the author when making notes in the course of his studies for the bar. These notes he enlarged and re-cast, so that he was able, in an intelligent and brief form, to unfold the principles of equity. This he did in five parts—the first, treating of maxims of equity; the second, of the exclusive jurisdiction of equity; the third, of persons under disability; the fourth, of concurrent jurisdiction; and the last, of the auxilliary and specially remedial jurisdiction of equity. The subjects treated of in the second part are trusts of different kinds, such as private trusts, public trusts, implied trusts, constructive trusts, and then chapters are devoted to *donationes mortis causâ*, legacies, conversion, re-conversion, election, performance, satisfaction, administration, marshalling assets, mortgages legal and equitable, pledges, penalties, forfeitures and liens. The subjects treated of in the third part are—separate estate of married women, their pin money and paraphernalia, their equity to a settlement, settlement in derogation of martial rights, infants and persons of unsound mind. The subjects treated of in the fourth part are—accident, mistake, actual fraud, constructive fraud, suretyship, partnership, account, set off and appropriation of payments, specific performance, injunction and interpleader. The subjects treated of in the last part are—discovery, bills to perpetuate testimony, bills *quia timet*, bills of peace, cancelling and delivering up of documents, bills to establish wills and *ne exeat regno*.

The work when first published was valuable to the student for its lucid unfolding of the principles of equity, and to the practitioner for its reliable collection of modern cases. The editor of the second edition, while following as far as possible the author's division of the subject, has brought it down to the present day, by reference to the more important changes effected by subsequent statute or case law. This he has done without much enlarging the size of the book, for while the first edition contained 564 pages, the second contains only 583 pages. The value of the work is increased by the addition of the new law and correction of the old by Mr. Griffith. So far as we can judge, he has done his work with reasonable skill and industry.

The price, in cloth, is 18 shillings sterling.

American Law Review. Boston: Little, Brown and Co., 110 Washington Street. July, 1872.

This number contains interesting articles on the following subjects: Slander and Libel; Responsibility for the condition of demised premises; the Wharton trial, &c.; also, the usual valuable digests of English and American Reports, and a list of law books published in England and America since April, 1872; summary of events, &c.

The British Quarterlies and Blackwood's Magazine. Leonard Scott Publishing Co., 140 Fulton Street.

These first-class reviews are duly received. Small wonder that the enterprise of the Leonard Scott Publishing Company meets with so much appreciation, when people are aware of how much of the best reading matter is given for such a small price. All who can afford it should subscribe at once.

ERRATA.

We regret that some errors occurred in the article in our last number headed "On Judicial Expression." The following corrections should be made: Instead of "whether" in line 20 of the 2nd column read "*where*," and instead of "beneath" in the 6th line of the verses read "*cometh*." "*Alley* v. *Dale*" should read "*Abley* v. *Dale*," and the next sentence should form the commencement of a new paragraph.

DIARY FOR OCTOBER.

1. Wed... Clerk and Deputy Clerks of Crown and Master and Registrar in Chancery to make quarterly returns.
6. SUN .. *19th Sunday after Trinity.*
7. Mon... County Court Term begins.
12. Sat... County Court Term ends.
13. SUN .. *20th Sunday after Trinity.*
15. Tues .. Law of England introduced into Upper Canada 1792.
18. Fri.... *St. Luke the Evangelist.*
20. SUN .. *21st Sunday after Trinity.*
25. Fri.... *Crispin.*
27. SUN .. *22nd Sunday after Trinity.*
28. Mon... *St Simon and St. Jude.*
31. Thurs. *All Hallow Eve.*

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THE

Canada Law Journal.

OCTOBER, 1872.

Our advertising columns announce the publication of a new work by Mr. S. R. Clarke, of Toronto, Barrister-at-Law, on the Criminal Law of Canada, which we have reason to think will be not only a success in itself, but also of immense service to the Profession and Magistracy in the Dominion at large. We have not yet had an opportunity of examining it, but a cursory glance would seem to show that it will prove a most valuable treatise on the criminal law as it applies to this country.

A pretty fair test of the confidence of the public and profession in their Judges is the number of appeals from their decisions. A return to an address of the House of Commons of Canada gives a statement of the number of cases taken before the Privy Council in 1869, 1870 and 1871, from Ontario, Quebec, New Brunswick and Nova Scotia, and the information given is highly suggestive. There have been only two cases actually appealed from Ontario; and though appeal bonds were filed in two other cases, no further action will probably be taken in them. Quebec has sent no less than twenty-one cases to the Privy Council, six in 1869, five in 1870, and ten in 1871. This points to a pleasant state of uncertainty in the minds of the profession in the Province of Quebec, as to what the law is in a variety of cases, and shews a laudable desire on the part of the litigants "to get to the bottom of it." The Supreme Court of New Brunswick has, during the same period, granted leave to appeal in six cases; but the courage of those concerned has partly failed them, for only three have been transmitted to England, and no action appears to have been taken in these. Only one case has been appealed during the same three years from Nova Scotia; and the further information is given in the return, that only three cases in all have been taken to England from that Province since 1860, when Sir Wm. Young was appointed Chief Justice of the Supreme Court. It will thus be seen that,

taking into consideration the business done in Ontario, the number of appeals is almost nominal as compared with Quebec, and much less than those in the other Provinces. The encouragement given to those who desire to have a *final* decision is not very great; for, out of all the cases referred to England, judgments have been given in only three of the Quebec appeals and in none of the others; two of the Quebec judgments having been reversed, and one confirmed.

The Lord Justice James has a way of interjecting very quotable and pungent sentences in his judgments. For instance, the other day he gave the pith of a much-used line of argument both for and against the Court of Chancery in a few words. A question arose upon the right of the Westminster District Board of Works to interfere with some buildings being erected by Lord Auckland, which they threatened to pull down by virtue of certain statutory powers. Upon demurrer to the jurisdiction the Lord Justice observed, "I have no doubt that this is a case within the jurisdiction of this court, so that the matter may be determined once for all, instead of leaving Lord Auckland to go before a magistrate and to discuss with him the question of jurisdiction and the construction of the Act of Parliament, which it is said on the part of the defendants involves some difficulty, and then, perhaps, to go to the Court of Queen's Bench to have the thing tried by *certiorari*. Of course, some persons may object to this court, but it is not the habit of this court to say that it is so bad a tribunal that people should go to all these different places, rather than come here to have their grievances decided."

We lately culled out a few judicial strictures upon the way in which some of the Canadian County Court judges do their work. We observe from a late judgment of Sir Robt. Phillimore, in an admiralty appeal, that his spirit has been vexed from a like cause. He mildly called attention to the fact that there were two things which concurred to render it impossible for the court to come to any satisfactory conclusion on the materials before it. First, it appeared that the notes of the evidence were merely rough notes taken by the learned judge of the County Court of Northumberland for his own guidance, and though no doubt (as he charitably puts it) sufficient for his purpose, yet they could not be regarded as satisfactory for the purpose of an appeal. Second, that he (Sir Robert) was without the assistance which, in many cases of the kind, he had derived from a statement of the reasons which influenced the court below in arriving at the decision appealed against. *The Busy Bee*, 20 W. R. 813. From all which it would appear that there are County Court judges who are alike all the world over.

LAWYERS IN PARLIAMENT.

The elections for the Dominion House of Parliament being now over, it may not be out of place to see how the legal profession in Ontario is there represented. We find on looking at the list, that out of the eighty-eight members for Ontario, some twenty are barristers, and of these seven are Queen's counsel. It would be highly uninteresting to discuss the question as to the propriety of having a large number of lawyers in Parliament, and we presume the usual number of "clap-trap" speeches have been made on that subject whenever a suitable occasion was presented by a member of the legal fraternity being a candidate, without in the slightest degree affecting the result of his election. But it is interesting to note the classification of those who have been elected.

Of course the first on the list is the statesman and great constitutional lawyer, who has for so many years ruled the destinies of this Dominion, but who has during that time been separated from the practice of his profession. The most prominent figures next to the Minister of Justice are, on one side of the House, the veteran and eloquent leader of the Bar in Ontario, the Treasurer of the Law Society, and on the other, one who, though his junior by many years, has in a short period of time by his high talent and great learning obtained a reputation at the Equity Bar of this Province which has never been equalled, and who is as well known to the country at large as he is in the profession. Of the rest, however, there are not very many whose names are familiar either on circuit or at Osgoode Hall. This may be to some a matter of surprise, but a little consideration will easily explain the reason. In fact, we need not recapitulate in

our own language what has already been stated publicly by lawyers in Parliament on this subject. Mr. Blake, in one of his speeches, said, when replying to some attack made upon him:

"When I went into public life, I was an active member of a large firm, and had a large and increasing share of the profits, producing to me at that time over £3,100 a year. Now my position is very different, for I have a fixed income from the firm of £1,200 a year only, while I should be receiving over £3,000 if I had remained in private life. I can gain nothing from the increased profits of the firm," &c.

Small encouragement this to ruin one's health in the public service. Even if in receipt of an official income in addition, Mr. Blake's salary would be considerably less than what he would receive from his profession. Of course, professional men who enter public life do not do so (at least we do not care to discuss the standing of those who do, if such there be) for the purpose of increasing their incomes, but those who thus devote themselves to their country, have other ills to bear than the mere loss of incomes. This part of the subject has been amplified by Mr. Harrison, when replying to an address of his constituents asking him again to become a candidate for West Toronto. His observations contain so much sound common sense, and so fully cover the ground, that we reproduce them. He says:

"I cannot longer owe a divided allegiance, part to professional and part to parliamentary duties, * * * and I cannot, after mature deliberation, hesitate as to the choice.

"What is it to be a member of the Parliament of Canada? It is yearly, at a most inconvenient time, to leave one's home, to neglect one's business, to work hard for the public, with the prospect of little or no thanks; to be abused when honestly doing what one's conscience conceives to be for the public interest; to have the worst possible motives imputed; to work day by day in committees of the House, considering all manner of details; to pass sleepless nights in an unhealthy atmosphere; and so to continue from year to year, and in the end, to be cast aside or elevated to office—and, if so elevated, to live a life of great drudgery and respectable poverty.

"What is it to be a member of the Canadian bar? It is to attend to one's business, to be well paid for what one does, to be praised for the honest discharge of duty, to be free from the imputation of unworthy motives, to work when and so often as one pleases, to have one's rest when rest is needed, to obtain a position worthy of honourable ambition, to retain it so long as one's health and energies will permit, and so to work from year to year in the almost certain hope of independence.

"It may be said that these views are selfish. No doubt they are so. But the law of self is a fundamental law of nature. The man who affects to disregard this natural law is as surely punished as the man who violates human law. An empty pocket and broken health are too often the penalties of faithfully serving the public, to the neglect of one's immediate interests.

"There are, in almost every constituency, some men who can serve the public with less inconvenience to themselves than others. Men who, by reason of large fortune, are independent of the sheriff, may safely do so. Men who have nothing to lose, and so nothing for the sheriff, may also do so. But the middle man, who has something to lose, and is desirous of increasing that something for the sake of his family, has everything to lose and little to gain. What is the gain? Perhaps after years of toil a position in the Government, a position which enables the malignant to attack with greater malignity, a position which demands of the sufferer unwearied exertions for less pay than the salary of a bank manager or the income of a second-class lawyer. And yet men are found, election after election, to summon caucuses, to attend conventions, to accept nominations, to address public meetings, to be slandered by one political party for enlisting under the banner of the other political party, to banish themselves from house and home, and yearly to imprison themselves for two or three months at hard labour within the walls of a House of Parliament. It is well that there should be such men. Selfishness is, I admit, a low spring of action, ambition is a more popular one. Some men are vain of distinctions. The ability to write M.P. after one's name, or to have the prefix of "Honourable" is, by some, deemed worthy of all the sacrifices which I have detailed. I have counted the cost, and am no longer prepared to continue the sacrifice. If ambition alone were the object of my life I would, perhaps, continue in public life. But one, in flights of ambition, is frequently reminded that humanity needs sustenance, and that other calls, if not so lofty, are not, on that account, to be despised."

We may here *en passant* quote an observation on the above remarks of Mr. Harrison by Mr. Goldwin Smith, in the *Canadian Monthly*, when speaking of the demoralizing tendency of political struggles:—

"The parting address of Mr. Harrison, of course, afforded a butt for the arrows of small wit. Yet, amidst the torrent of electioneering trash, it was, perhaps, the one thing worthy of a moment's remembrance. We shall find that it is necessary to make public life tolerable to sense and self-respect, or to pay for their exclusion."

Of course, there are prominent men, leaders of political parties, who will be found ready, though not willing, to sacrifice their own ease and comfort on the call of patriotism or ambition, but these are so few as to form the exception; and whilst we honour these for their patriotism, or pity those for their ambition, we can scarcely wonder that so few of those who have taken a first place at the Bar, think it worth their while to venture on the stormy sea of politics.

DUTIES OF JUDGE AT NISI PRIUS.

It will be well for our readers to note that some of the views expressed by Mr. Justice Gwynne in *Walsh* v. *Nattrass*, 19 C.P.453 have been contravened by the effect of a late decision in England. We refer to his remarks as to the duty of the judge at Nisi Prius to stop the case when it appears in the evidence, that a felony was being made the foundation of an action for damages, before the criminal act had been adjudicated upon by the proper criminal tribunal. His views proceeded upon the authority of various English and Canadian cases cited in the judgment, all of which must be now held to be overruled by *Wells* v. *Abrahams*, 20 W. R. 659, Q. B., a report of which, taken from the *Law Times*, will be found in another place. Mr. Justice Lush was pressed by the defendant to non-suit, or to direct a verdict for him, but he declined to stop the case or to withdraw the issues from the jury. That ruling was upheld by the court, Cockburn, C. J., observing, "The only question which we have to consider is whether my brother Lush was called upon to interfere. Now I am totally at a loss to see from what source that power could be derived. The judge is frequently not even a member of the court in which the proceedings are being tried; he is merely an instrument for the purpose of trying the issues. On a proper application he might, perhaps, let it go to the court to determine what should be done, but at the trial he can only deal with the issues on the record." With this view all the judges express their concurrence. The effect of the decision is to over-rule *Wellock* v. *Constantine*, 2 H. & C. 146, upon which Mr. Justice Gwynne's opinion mainly proceeded. These views, though at first not agreed to, appear to be adopted by Hagarty, C. J., in *Williams* v. *Robinson*, 20 C. P. 255, but they must now be taken not to be law.

SURROGATE COURT ADVERTISEMENTS.

In the palmy days of Chancery practice, administration suits were considered fair game for the profession. One of the English Vice-Chancellors, who loved his joke, was wont to say when pronouncing judgment on applications of this kind, "Let the usual order go for the destruction of the estate according to due course." But now-a-days, "*Nous avons changé tout cela.*" Yet still a strict eye has to be kept upon all matters pertaining to the estates of deceased persons. Very often there is no one who has a personal interest in keeping down the expenditure connected with the adjustment of such estates.

Our attention has been lately called to a quite unnecessary outlay for disbursements in publishing advertisements of the Surrogate Courts for next-of-kin and the like, prior to grant of administration. Take, for instance, cases arising under the 35th section of the Act, C. S. U. C. cap. 16, where a citation or summons is published pursuant to the 26th Rule of Court. It is true that this rule requires the judge to direct by special order in what papers the citation or summons is to appear by way of advertisement, but neither statute nor rule of court requires that both the order and the citation should be published as is almost invariably done. There is no propriety in publishing—no necessity to publish the order: all that is accomplished by so doing is to double the length and the expense of the advertisement. The order is intended, not for the information of the persons cited, but for the guidance of the officers of the court and the solicitors in charge of the business.

COMMERCE IN LAND.

In former years, Mr. Cobden was one of the most conspicuous movers in England in agitating for the adoption of a scheme tending to reform the law relating to land, in its posses-

sion, enjoyment and disposition, and in matters referring to its title by inheritance or purchase. His views were, that the law should be so changed as to give greater freedom to the alienation of land, so that owners willing to sell, and persons of means willing to buy, should be able to deal together with safety and expedition, and also without undue expenditure in searching and clearing up the title. To this end, he favoured the adoption of the law of primogeniture, and was prepared to advocate the incorporation into English law of certain portions of the French legal code. Since his time, there has been a movement in the same direction going on in England to a greater or less extent. The last manifestation of its progress is to be seen in the proceedings at the Social Science Congress for this year.

Mr. Jacob Waley, one of the conveyancing counsel of the Court of Chancery, read a very comprehensive and able paper concerning the best means for facilitating the transfer and disposition of land,—having special reference, of course, to property in England. He does not deal with the subject of registration of title, which gives Canada an immense advantage in the ease and simplicity, to say nothing of the smallness of expense, with which land can be transferred from owner to owner. But he suggests certain changes in the mechanism of the English system, which are of value here in so far as we have adopted the English law of real property. These details he has grouped under six divisions, as follow:

"I. It will hardly be questioned that the length of time allowed by law for the assertion of dormant claims largely contributes to the expense and difficulty of the preliminary investigation to which the title to land is subjected upon transfer. Now, the length of time which ought to operate as a bar to an unasserted title must, of course, differ according to circumstances. When the law is not easily accessible or put in motion, when communications are imperfect and intelligence travels slowly, so that opportunities are given to the powerful and the crafty to wrest the devolution and ownership of land out of its lawful course, a longer time must obviously be allowed for the assertion and restoration of displaced titles. "No one, probably, has ever perused our older law books, from Littleton downwards, without noticing the great space and importance given to the subject of disseisin or forcible dispossession of the rightful owner of land, and inferring the comparative lawlessness of the times when disseisin was regarded as among the ordinary contingencies of landed property. At present a possession, adverse to the true legal title, has very rarely any other foundation than accident; and when a misconception of this kind has once occurred, it is rarely brought to light otherwise than by accident. Such windfalls of fortune it seems consistent with a sound jurisprudence rather to discourage than to promote. Even under the old law, a fine followed by non-claim for five years operated in most cases as a conclusive bar; and it appears to me that in the circumstances of modern society, a period of five years, instead of the twenty now given by the Statute of Limitations of the 3 & 4 Will. IV., would be quite sufficient to allow for the assertion of dormant or displaced rights, with the addition, say, of ten years more in cases of infancy and absence.

II. Under the present Statute of Limitations of 3 & 4 Will. IV., an adverse possession gained by time against a tenant for life is inoperative against his successors in interest, each of whom gets a new period of twenty years from the time at which his own interest would commence. It has been suggested, and in that suggestion I concur, that adverse possession should operate against the estate—that is to say, not merely against the limited owner, during the currency of whose interest the adverse possession takes place, but against the whole series of owners having successive interests, who for this purpose should be considered as represented by the owner entitled to the possession and barred by the non-assertion of his rights.

A proposal to the above effect was, I believe, contained in a bill unsuccessfully promoted some years since by Lord St. Leonards. It may appear unjust that the *lachés* of the tenant for life should bar the remainderman, but I think that the injustice is apparent only, the impression being due to our technical conceptions as to the ownership of land. If the limited owner, instead of being called tenant for life, were regarded as owner of the estate, but with a limited power of alienation, there would be nothing repugnant in the estate being bound by his *lachés*. Besides, the case of land being recovered by the remainderman after the tenant for life has been barred by adverse possession, is so rare as to render it inexpedient that it should be the subject of special legislative provision. *In ea quæ frequentius accidunt subvenium jura.* It must be admitted that both the changes here contended for, namely, a shortening of the period of limitation and the operation upon the estate of adverse possession as against a limited owner, would require the broad and free exercise of the jurisdiction to deal with cases

of fraud so as to prevent unjust acquisition by trustees and others having peculiar means of knowledge or influence, or owing to collusion between the limited owner and the wrongful possessor.

III. As under the course of dealing by which a purchaser is protected—roughly indeed, but on the whole pretty effectually—against concealed incumbrances, the possession of the title deeds is that on which he has mainly to rely as evidence of the safety of the title, it is most desirable to eliminate those risks which arise when the ownership of the title deeds is not accompanied by the full and unencumbered ownership of the estates. The predicament of an owner in fee, who by settlement has reduced his estate to a tenancy for life, and who, retaining the title deeds, would, by mere suppression of the last settlement, be able to present all the outward signs of absolute ownership, is constantly present to the apprehensions of the conveyancer. The danger occasioned by this facility for fraud might be obviated, if the law required, as a condition of the validity of settlements of land against a subsequent purchaser, that the settlement should be enrolled, say, at the Common Pleas, at which searches have in ordinary course to be made before the completion of the purchase. For the purpose of such an enactment, a settlement might be defined as an instrument (not testamentary) by which successive interests are created in land or the proceeds of land, or by which the land is subjected to any charge otherwise than for the payment of money lent.

IV. Though I think that the system of settlement by which persons in being are restricted to the enjoyment of land or of the income of the proceeds during their lives, and the corpus is retained for the next generation, is one which has unanswerable claims to be preserved, I do not hold the same opinion with regard to the ingenious and elaborate system of protection to estates tail, which prevents alienation by expectant heirs, and which is supposed to be one of the most powerful means of keeping estates in the same family from one generation to another. To what extent the transmission of family estates is really perpetuated by this system is a matter on which opinions would probably differ. My own opinion is that the perpetuation of estates in the same family would not be materially affected by the abolition of the system of protection.

But regarding, as I should, with regret, any large inroads on the permanence of landed property as a family possession, I nevertheless consider that this permanence, so far as not secured by the sentiments and principles of the proprietary class, has no claim to be specially protected by law. I think, therefore, that it would be a beneficial change, calculated to promote the free circulation of land both by removing restrictions to which it is needlessly subjected, and by dispensing with a mass of technical difficulties, if estates tail existed only for the purpose of defining and limiting the devolution of the land, so long as not disposed of by the act of the tenant in tail, and if the tenant in tail, whether in possession or reversion, had in all cases the full power of disposing (subject, of course, to prior interests) of the fee simple of the land.

V. The want of a real representative or person who, upon death, can exercise the same powers over the real estate as the executor has over the personal estate, has been long acknowledged, and should be supplied. I think that the personal representative might, without inconvenience, have in all cases the power to sell or mortgage the real estate of the deceased, and to receive the money. The practical conveyancer, who probably finds in informal wills the most frequently recurring obstacle to alienation will best appreciate the importance of an improvement by which this source of difficulty will be got rid of.

VI. The last alteration which I am about to propose, is a great extension of the existing facilities for the letting on lease and for the sale of settled estates. The Settled Estates Act was itself an important measure of relief, of which advantage has been extensively taken. But the power of letting property for any purpose for which it may be adapted, and of selling it into the hands best able to develop its capabilities, is one which ought in the public interest to exist universally, and to be easily exercisable. The machinery of notices and consents required by the Settled Estates Act ought, as it appears to me, to be dispensed with. A power of leasing, at least as extensive as the Court of Chancery can exercise under the Settled Estates Act might, I think, be exercisable as a matter of course, and without the intervention of the court, by a limited owner in possession, the obligation to take the best rent, without any fine or premium, being in general a sufficient guarantee that the interest of the lessor will be in accordance with that of his successors in estate. As regards a sale, it may be reasonable that the limited owner in possession should be required to make an *ex parte* application to the Court of Chancery for leave to sell; and as he could not be allowed to receive the purchase money, he might, on the same application, obtain the appointment of trustee to receive the money, and hold it upon trusts corresponding to the interests in the land."

PROFESSIONAL ETIQUETTE.

A legal firm not two hundred miles from Toronto, has propounded and distributed a printed circular which is more in the green grocery line of advertising than anything we have seen for some time, and which is about the best of the kind that has been published. The circular commences by stating that "The undersigned have any amount of money on hand to loan, &c., on more favorable terms and at a less rate of interest *and expense* than any other office in the county." Very accommodating, certainly, not to say modest; and very useful in the present tightness of the money market, but we are quite prepared to hear ill-natured people suggest that the *expense* may possibly be *greater* "than any other office in the county," if the highly-favored borrower falls behind in his payments. The public are then informed that "a large amount of the above consists of trust funds, which will be loaned at 7 per cent., provided the security be first-class real estate." This is well; but for fear the inducement set out above should prove insufficient to tempt customers to give the advertisers a trial before going elsewhere, the circular concludes thus: "We would ask those wishing to borrow, *or otherwise requiring our services* to give us a call, and we are confident of being able to deal satisfactorily with them." Were it not that the business card of this firm appears at the head of the circular it would be difficult to say in what line these enterprising, not to say funny, advertisers do business. We should be glad to encourage them by giving their names, and thereby a gratuitous advertisement; but we fear that the medium of this journal is not one that they would select as likely to benefit them in their peculiar line.

This, however, though highly unprofessional, and therefore objectionable, is not perhaps quite so bad as another breach of propriety that we have lately heard of. We are informed that a client of a Toronto solicitor keeps on hand a stock of half sheets of note paper, with the card of the solicitors printed at the top, then a request to pay "the following claim, otherwise proceedings will be taken to enforce it," (or words to that effect), and concluding with the name of the solicitor, also printed. When the enterprising client desires to frighten a delinquent debtor he sends him one of these "lawyer's letters," and this without further trouble or expense. We presume this is done with the general assent of the solicitor, and we should suppose there must be some *quid pro quo*.

These practices may be more general than we suppose, but we do not like them any the better for that. The status of the profession is low enough already in many ways. If some in it are so ignorant of its niceties, or care so little about them, or are so needy, let them give up the law, and try to make a living in another and more congenial sphere.

ONTARIO CONTROVERTED ELECTIONS.

Since the meeting of the local House in December last, two petitions have been presented under "The Controverted Elections Act of 1871."

The first of these was complaining of the election of Mr. James S. McCuaig, who had been returned for the County of Prince Edward, upon the vacancy caused by a former election for the county being declared void upon a petition. The election was held on the 22nd and 29th of last December, and the petition was filed on the 22nd of January following. The complainants were four voters at the election, and the seat was claimed for his opponent, Mr. Gideon Striker. The case came on for hearing before Mr. Justice Morrison, at Picton, on the 23rd of August last, and resulted in the respondent being unseated, and Mr. Striker declared duly elected. The trial occupied little more than an hour, and no point of special importance was determined.

The other petition was against the return of Mr. Christopher Finlay Fraser, who had been elected to fill the vacancy caused by the death of the late Mr. McNeil Clarke, for the South Riding of the County of Grenville. The election was held on the 19th and 20th of March last, and the petition, claiming the seat, was filed on the 25th of April by Mr. William Ellis, the opposing candidate at the election. The respondent was charged, both personally and by his agents, with the commission of corrupt practices. Recriminatory charges of a similar nature were made by the respondent against the petitioner. The trial began at Prescott, before Vice-Chancellor Mowat, on the 3rd of September last, and continued until the 14th of the same month, when judgment was given declaring the elec-

tion of Mr. Fraser void, and that no person was duly elected. The case was determined, by consent of parties, upon the scrutiny, the petitioner having abandoned his charges of corrupt practices. No decision was given upon the recriminatory charges. The present case was another illustration of the practical impossibility of carrying a lengthened scrutiny to its conclusion under the system now in force, owing to the immense expense which such a process involves. Here the scrutiny occupied the greater part of a week, at the end of which time comparatively small progress had been made, and a final decision was arrived at by the respondent admitting to be bad a number of votes sufficient to deprive him of his majority.

Some idea may be formed of the expense entailed upon the parties, when it is stated, that besides the respondent, who is himself a member of the legal profession, and took an active part in the management of the case, four counsel, together with the attorneys for each party, attended daily in court during the fortnight which the trial occupied, and that the number of witnesses subpœnaed was several hundred.

Mr. Brough, the very efficient Registrar of the Court on this petition, is preparing a report of the case for this journal, which, from his thorough knowledge of the subject, cannot fail to be a valuable addition to the series of election cases which we have published from time to time, and which cannot be elsewhere obtained.

A friend lately sent us a West Indian newspaper, which contains the charge of Chief Justice Peel to the Grand Jury at Antigua. It appears that one result of the confederation of the Leeward Islands, proclaimed on 30th March last, was the extinction of grand juries in that colony. The learned Judge "regrets the cessation of an institution which history tells us has often done good service in the cause of liberty and justice;" and he thus continues: "Its value has been most apparent in troublous times. Often and again, in England's stormy story, in her many fits of political and religious phrensy, have Grand Juries—those of London and Middlesex especially—thwarted the vengeance of an angry monarch, an unscrupulous government, or of a victorious faction, and interposed between them and their intended victim."

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, *Esq., Barrister-at-Law.*)

Bigelow v. Cleverdon.

C. L. P. Act, sec. 158—Compulsory reference.

Under the above section a country cause may be referred to the arbitration of an officer of the proper Court at Toronto, as well as to the County Judge.

[Chambers, January 13, 1872.—*Mr. Dalton.*]

Tilt having obtained a summons under Con. Stat. U. C. cap. 12, sec. 158, to show cause why the matters in dispute should not be referred to the arbitration of the Judge of the County Court of the County of Wentworth, or such other person as might be appointed, now asked that the reference might be made to Mr. Jackson, the Clerk of the Common Pleas, in which Court the action was brought. The writ had been issued in the county of Wentworth. The plaintiff had not declared.

Mr. Clute (Harrison, Osler & Moss) —It would be more convenient to try the case at Hamilton, in the county of Wentworth, and by the statute the reference must be to the Judge of that County, the writ having issued there; and the case cannot be referred to the Clerk of the Court in Toronto: *Cotton* v. *McKenzie*, 2 U. C. L. J. 344; *McEdward* v. *McEdward*, 3 U. C. L. J. 75.

Mr. Dalton.—Under the circumstances of this case, it must be referred to the Judge of the County of Wentworth, though I am reluctant to burden him with it, as he is not, as Judge, entitled to any fees * I do not think, however, that in country causes the reference *must* be made to the proper County Judge. The words of the statute do not limit the reference to him, but merely state that a reference may be made to him in country causes as well as to the officer whose appointment is authorized by the preceding words of the section. I am quite clear that a case like this might properly be referred to an officer of the Court at Toronto.

Jameson and Carroll v. Kerr, Galley v. Kerr.

Replevin—Assignee in insolvency—Con. Stat. U. C. cap. 29, sec. 2—Insolvent Act, 1869, sec. 50.

Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding Con. Stat. U. C. cap. 29, sec. 2.

[Chambers, Feb. 8, 1872.—*Mr. Dalton* and *Gwynne, J.*]

J. H. Macdonald for Jameson and Carroll, and *Clarke* for Galley, moved before Mr. Dalton for orders to replevy certain bricks which had been seized by the Sheriff of the County of York, under an attachment in insolvency against one Moran, and handed over by the sheriff to Mr. Kerr, an official assignee, as guardian. The applicants claimed these bricks

* It is usual now for references such as those alluded to above to be made to a County Judge, mentioning him by name merely, without reference to his public capacity, so as to get over the difficulty as to fees. This can only be done, of course, by consent of the parties.—Eds. C. L. J.

as their property, having purchased them from Moran.

Mr. Dalton refused to grant orders for writs of replevin on the ground that section 2 of the Replevin Act precluded replevin under such circumstances. From this decision the applicants appealed to a judge. The matter was then argued before Mr. Justice Gwynne, who, reversing the decision of Mr. Dalton, ordered writs of replevin to issue. The further facts of the case appear in following judgment of

GWYNNE, J.—These were two summonses by way of appeal from two orders made by Mr. Dalton in these cases, whereby he discharged two several summonses asking for writs of replevin to issue in these suits, and refused to grant the writs of replevin upon the ground that the goods sought to be replevied were in the custody of Mr. Kerr, an official assignee, as guardian, under a delivery to him, by the sheriff, of the goods in question, seized under a writ of attachment issued from the County Court in compulsory liquidation against one Moran, an insolvent

The evidence offered upon affidavits by the applicants is strong to show, and conclusive, if not contradicted, that the goods in question, namely divers kilns of bricks, were the property respectively of the applicants. No affidavits are offered in opposition to the title set up by them; it may be that Mr. Kerr, being official assignee, can admit nothing. The case, therefore, stands thus: that the evidence of title offered by the applicants, although not admitted, is not denied; the property seized is shown to be of that nature that, having regard to the business of the respective applicants, namely that of builders, they may be exposed to very serious injury if the property should not be restored to them, which any damages which they might recover in actions of trespass would not reimburse them for, and Mr. Dalton, I am informed by himself, felt this so strongly that he would have granted the writs without hesitation, if he had not considered himself fettered by the language of the second section of the Replevin Act, Consolidated Statute U C ch. 29.

By that section it is provided that "the provisions herein contained shall not authorize the replevying of or taking out of the custody of any sheriff or other officer any personal property seized by him, under any process, issued out of any court of record for Upper Canada" The section is consolidated from 18 Vict ch 118 In order to put a correct construction upon this section, it will be necessary to consider what was the law before the passing of the Act from which this section is taken, for the purpose of consolidation, and what was the object of the Act.

Although it was held in England in the cases collected and cited in *Harling* v. *Mayville*, 21 C. P. 499, that replevin lay for *any wrongful taking* of property from the possession of the true owner, still it never lay where the taking was in execution under a judgment of a superior court, and the reason is given by Parke, B., in *George* v. *Chambers*, 11 M & W 160, citing Chief Baron Gilbert's treatise on Replevin, p. 188, as his authority, where it is said, "If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution; and if any person shall pretend to take out a replevin and execute it, the court of justice would commit him for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, *and it would be troubling the execution awarded, if the party upon whom the money was to be levied, should fetch back the goods by replevin*, and therefore they construe such endeavour, to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the court, they will treat it as a contempt, and punish it by attachment of the sheriff" In *Rex* v *Monkhouse*, 2 Str. 1184, the court granted an attachment against a sheriff for granting a replevin of goods distrained on a conviction for deer stealing, for the reason that the conviction was conclusive and its legality could not be questioned in replevin; and in *Earl Radnor* v. *Reeve*, 2 Bos. & Pul 391, the court said that it had been determined that when a statute provides that the *judgment* of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way; and so not in replevin

In *Pritchard* v. *Stephens* 6 T. R 522, where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin moved into the King's Bench, the court refused to quash the proceedings, leaving it to the defendant in replevin to put his objection in a formal manner on the record. In that case Callis is cited, p. 200, where he says, "If upon a judgment given in the King's Court, or upon a decree made in the court of sewers, a writ or warrant of *distringas ad reparationem* or of that nature be awarded, and the party's goods be thereby taken, these goods ought not to be delivered to be taken either out of this court or out of any other court of the King, *because it is an execution out of a judgment*," and it is said there, citing another passage of Callis, p 197, that there is a distinction between those goods that remain in the custody of the officer under the seizure and those that afterwards come into the hands of a purchaser, saying that the former are not repleviable; however, the court refused to quash the proceedings, leaving the defendant to raise his defence upon the record, although the goods were replevied out of the hands of the officer acting under the decree and warrant of the court of sewers.

Thus, then, the law stood in England, that for any wrongful taking a replevin lay except where the taking was in execution under a judgment of a superior court, or of an inferior tribunal whose judgment was by statute made final and conclusive, to which may be added the further exception where the taking was in order to a condemnation under the revenue laws: *Cawthorne* v. *Camp*, 1 Anst. 212, or for a duty due to the crown: *Rex* v *Oliver*, Bun. 14, and the reason of the law that goods taken in execution could not be replevied was that it could not be endured that the cause of justice should be frustrated by permitting the party, *upon whom the money was to be levied*, in satisfaction of a judgment of a superior court, or of a judgment

or conviction made final by a statute, *to fetch back* the goods by replevin, and so delay the plaintiff in his recovery of the fruits of his judgment. The reason then given for the courts in England, holding it to be a contempt of court for a party to proceed, and consequently for their not permitting him to proceed by replevin, in respect of a seizure under an execution issued out of a superior court, applies only to the case of a replevin brought or attempted to be brought by him against whom the execution issued. While adopting the same principle, there have been, in the supreme court of the State of New York, several cases of replevin being maintained even against a sheriff in respect of goods taken in execution.

In *Clark* v. *Skinner*, 20 Johnson, 465, it was held that replevin lies at the suit of the owner of a chattel against a sheriff, constable, or other officer who has taken it from the owner's servant or agent while employed in the owner's business, by virtue of an execution against such servant or agent, the actual possession of the property in such case being considered as remaining in the owner, and not in the defendant in the execution. Platt, J., giving judgment says, "Suppose John Clark (against whom the execution was and from whom the goods were taken) had taken the horse and sleigh as a trespasser himself, would they be *in the custody of the law* as to the true owner, *because the constable happened to find them in the hands of a person against whom he had an execution?* If I leave my watch to be repaired, or my horse to be shod, and it be taken on a *fi. fa.* against the watchmaker or blacksmith, shall I not have replevin? If the owner put his goods on board a vessel to be transported, shall he not have this remedy, if they are taken on execution, against the master of the vessel? It seems to me indispensable for the due protection of personal property. In many cases it would be mockery to say to the owner—Bring an action of trespass or trover against the man who has despoiled you. Insolvency would be both a sword and a shield for trespassers. Besides there are many cases where the possession of chattels is of more value to the owner than the estimated value in money, and the action of detinue is so slow and uncertain, as a specific remedy, that it has become nearly obsolete" "The rule," he proceeds, "I believe is without exception, that wherever trespass will lie the injured party may maintain replevin. Baron Comyns says, 'Replevin lies of all goods and chattels unlawfully taken,' (6 Com. Dig. Replevin A) 'Though,' he says, (Replevin D) 'replevin does not lie for goods taken in execution. This last proposition,' he adds, 'is certainly not true without important qualifications. *It is untrue as to goods taken in execution where the fi. fa is against A. and the goods are taken from the possession of B*, (being the property of the latter, is plainly intended) "By goods," he proceeds, "*taken in execution*, I understand goods *rightfully taken in obedience to the writ*, but if, through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were *taken in execution*, in the true sense of the rule laid down by Baron Comyns."

In *Thompson* v. *Button*, 14 Johnson, 84, it is laid down that goods taken in execution by a sheriff out of the possession of the defendant in the execution, being in the custody of the law, cannot be replevied, *but if the officer having an execution against A. undertakes to execute it on goods in the possession of B, the latter may bring replevin for them* The chief justice in giving judgment says, "As a general principle, it is undoubtedly true that goods taken in execution are in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody, *when the officer has found them in and taken them out of the possession of the defendant in the execution.*" This judgment is in precise accord with the law of England, as I understand it.

In *Hall* v. *Tuttle*, 2 Wend. 476, the law is laid down in precisely the same language. The court, in giving judgment, adds, "The sheriff levies at his peril, if the property does not belong to the defendant in the execution"

In *Dunham* v. *Wyckoff*, 8 Wend. 279, the case came up on demurrer, which admitted that the property in the goods seized under execution was in the plaintiff in replevin, although when seized they were in the possession of the person against whom the judgment and execution was had Judgment was given for the plaintiff on the demurrer, as the pleadings admitted the property to be his A similar point was decided on error in *Acker* v. *Campbell*, 33 Wend. 372.

The principle upon which these cases proceed seems to be in accord with that stated by Chief Baron Gilbert as the principle upon which the courts in England refused to permit replevin to be brought in respect of goods seized under an execution issued upon a judgment recovered in the superior courts.

Our law of replevin in this country would seem to have its foundation in 4 Wm IV. cap 7; for the sheriff in this country, having no county court, it is difficult to see how the action could have been brought before that statute. (See *Hutt* v. *Keith*, 1 U.C.Q.B. 478) By that Act, the remedy seems to have been limited to the case of a wrongful distress, probably because of there having been an opinion prevalent that it was only in such case that replevin lay in England. The Act provides that any person complaining of a wrongful distress in a case in which by the law of England replevin might be made, may, on filing a procipe, obtain from the crown office a writ of replevin in a form given by the statute.

This law was amended by 14 & 15 Vic cap. 64, A.D. 1851, whereby it was enacted "that whenever any goods, chattels, deeds, &c., valuable securities or other personal property or effects has been or shall be wrongfully distrained or otherwise wrongfully taken, or has been or shall be wrongfully detained, the owner, or person or corporation who by law can now maintain an action of trespass or trover for personal property, shall have and may bring an action of replevin for the recovery of such goods, chattels or other personal property aforesaid, and for the recovery of damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress." The writ was to be

obtained only upon an affidavit of the claimant, his servant or agent, that the person claiming is the owner of the property claimed, describing it.

The effect of this Act was to introduce the law as existing in England, namely, to authorize replevin to be brought for any wrongful taking, with this further addition, that it should also lie wherever trover lay.

It happily seldom occurs that a sheriff or his officer, under a writ of execution against B., wantonly and vexatiously, and without any reasonable excuse, takes from A his goods, of which he is in actual visible possession as undisputed owner. Consequently, we do not find that to redress such a wrong, any person required to avail themselves of the privileges of the Act by bringing replevin.

But cases of persons not being in actual possession, but claiming to be the owners, by virtue of some contract with an execution debtor, of goods taken under an execution from the actual visible possession of an execution debtor as apparent owner, are cases which do frequently occur in practice *In such cases as last mentioned the action of replevin did not lie according to the law of England.* That remedy was only available when goods were taken from and out of the possession of the plaintiff in replevin, who also claimed to be the true owner, and therefore entitled to *retain* the possession and enjoyment of the goods taken. Replevin being the *re* delivery of the goods taken *to the person from whose actual possession they were taken*, upon pledges given by him to prosecute his claim of right to *retain* such possession. Although, according to the law of England, the real owner of goods taken under execution from the actual possession of an execution debtor as apparent owner, could not maintain replevin, nevertheless, upon the construction put upon 14 & 15 Vic. cap. 64, such persons were permitted in this Province to bring *replevin* against the sheriff, and to have his right tried in that form of action. Of such class of actions, *Short* v. *Ruttan* (Sheriff), 12 U. C. Q B. 79, is an example.

The words of the Act authorizing the owner to bring replevin in all cases wherein he could maintain trespass or trover, seemed to authorize him to bring an action of *replevin*, although the goods were never taken out of his actual possession, and although according to the law of England replevin in such a case could not be maintained. Doubts, however, were entertained whether it could have been the intention of the Legislature to place the remedy by replevin upon a footing so different from that upon which *ex vi termini*, and according to the law of England, it stood in England. Accordingly, to remove these doubts, the Act 18 Vic. cap 118, appears to have been passed. The preamble of that Act recited that, "Whereas doubts have arisen whether by the provisions of a certain Act of the Parliament of this Province, passed in the fourteenth and fifteenth years of Her Majesty's reign, entitled, 'An Act to amend and extend the law relative to the remedy by replevin in Upper Canada,' when any goods and chattels or other personal property and effects in the said Act mentioned have been seized and taken in execution, or by attachment or otherwise, under process from any Court of Record in Upper Canada, *the same can be replevied* and *taken out of the hands and custody of the sheriff or other officer to whom the execution of such process of right belongs;* and whereas it is expedient to remove such doubts,"—and the Act declared that the said Act did not authorize, and shall not be construed to have authorized and permitted, or to authorize and permit, the replevying and taking out of the hands and custody of any sheriff or other officer, as aforesaid, any such goods and chattels which such sheriff or other officer shall have seized and taken, *and shall have in his lawful keeping under and by virtue* of any process whatsoever issued out of Her Majesty's Courts of Record in Upper Canada. Upon the passing of this Act it was held, in accordance with the law as it was always understood in England, that a person out of possession could not maintain replevin in respect of goods seized and taken in execution from and out of the possession of the execution debtor: *Calcutt* v. *Ruttan*. 13 U.C 146. That decision is what would have been decided if the remedy by replevin had existed in this Province precisely as it existed in England, and the 14 & 15 Vict. cap. 64, had never been passed.

In so far as goods taken in execution were concerned, the object and effect of the Act 18 Vic. seems to have been to place the law in this Province upon the same footing as in like cases it was in England; but the Act went further, and extended to goods seized under an attachment against absconding debtors *the like* protection from the remedy by replevin, and, as it seems to me, *only the like* protection as by the law of England surrounded goods taken in execution. And there appears to be some reason for this, although the writ of attachment is not preceded by a judgment, as an execution is; because by the Act respecting absconding debtors in force at the time of the passing of 18 Vict. ch. 118, namely, 2 Wm. 4, ch. 5, sec. 4, provision was made, *more effectual than replevin*, and the like provision now exists under Consolidated Statute 22 Vict. c. 25, for superseding the attachment and obtaining restoration of his goods *upon the application of the defendant* in the suit on his giving bail in respect of the action in which the attachment issued: The language of the Act 18 Vict ch 118, namely, "any such goods and chattels which such sheriff or other officer shall have seized and taken, *and shall have in his lawful keeping under and by virtue of* any process, &c., seems to me to accord precisely with the judgment of Platt, J., in *Clark* v *Skinner*, 20 Johnsons' Report, *supra*, wherein he says: "By goods taken in execution I understand goods *rightfully taken in obedience to the writ*," but if through *design* or mistake the officer "takes from A. goods which are not the property of, nor, I add, in the possession of the defendant in the execution when taken, he is a trespasser, and such goods never were taken in execution in the true sense of the rule laid down by Baron Comyns"—goods of which the defendant is in possession when seized under and by virtue of any process against him authorizing the seizure of his goods and chattels are in the lawful keeping of the officer, *under and by virtue* of the process, because the possession of goods *prima facie* implies property—but if a sheriff or his bailiff, or the bailiff of a division court, (for 23 Vic. ch.

45, sec. 8, places goods seized by him under any process issued out of a division court in precisely the same position, as to the action of replevin, as 18 Vict. ch. 118 did goods seized by a sheriff under process from any court of record,) wantonly and causelessly, and, it may be, maliciously, takes from the actual and undisputed possession of the real owner *his* goods under colour and pretence of an execution or other process which he has for execution upon the goods of another, shall the person upon whom such wanton wrong may be committed, be held to be deprived of a right, recognized by the law of England, of availing himself of the only remedy which in the given case may be competent to secure him any adequate redress?

The second section of Con. Stat. U C. c. 29, is expressed in briefer language than 18 Vict c. 118, but the substance and effect of both is the same, and both must receive the same construction. Now, certain of the goods of a judgment debtor are by law specially exempted from all liability under any execution issued upon the judgment: as, for example, the bed, bedding and bedsteads in ordinary use by the debtor; the necessary and ordinary wearing apparel of himself and his family; the tools of his trade, to a certain amount. If, then, a sheriff's bailiff, or the bailiff of a division court, although the right of exemption should be claimed, should vexatiously and wantonly seize these exempted articles; or if a sheriff's bailiff, or the bailiff of a division court, without any pretence of right, should vexatiously and wantonly enter the house of A., and strip it of all his household furniture in his actual use, merely because the bailiff has in his hands an execution or other process against the goods of B.; or if a sheriff's bailiff, under like circumstances, should seize a raft of timber belonging to A. and in his possession, on its way for delivery to C., under a contract which A. is bound under heavy penalties to fulfil, and should so cause a breach of the contract; or if, under like circumstances, and it may be by fraudulent collusion with B, the execution debtor, or with his creditor, the sheriff should seize a steamship belonging to A and in his possession, freighted with goods and passengers, at the moment of its departure from port on its voyage, and so prevent the voyage altogether—can any of these goods so wrongfully seized be, with any propriety of language, said to be *in the lawful keeping of the sheriff or bailiff, under and by virtue of a process which neither directs nor warrants any such service.* Or shall it be said that a judge, when invoked to permit the party so wronged to seek redress in the only form of action which can give him any relief, shall have no jurisdiction to do so? Similar instances without number, of wanton injury, might be enumerated, where the goods of an utter stranger to the process in the bailiff's hands, and to the person against whom it has issued, may be wrongfully and vexatiously seized by the officer; wherein, if a judge, upon hearing the parties, and being satisfied that the seizure is utterly inexcusable, cannot sanction the issuing of the writ of replevin, the hands of justice must be admitted to be most cruelly tied. I am not aware of any case which has held that justice is so crippled. In this case I am not called upon, however, to rest my decision upon the ground that in answer to the application for the writs there is no denial of what is plainly asserted on oath, namely, that the goods seized were the property of and in the possession of the claimants when seized, and that they were wrongfully seized without any process authorising such seizure; for I am of opinion that the goods now being in the possession of the official assignee are not in the custody of the sheriff or other officer under the process, within the meaning of section 2 of 22 Vic. c 29, even though that section could protect the goods in the hands of the sheriff from being reached by a writ of replevin.

The execution of all process coming out of courts of record to be executed, belongs to the sheriff of the county to whom it is addressed, except when the sheriff is himself a party, when it belongs to the coroner to execute it

The term, then, "sheriff or other officer," in 18 Vict cap. 118, and in 22 Viot cap 29, sec. 2, as indeed is plainly expressed in 18 Vict, means a sheriff or other like officer, as his deputy, bailiff, or a coroner, "*to whom the execution of such process of right belongs;*" and what is declared not to have been authorised is the replevying the goods which *such* sheriff or other officer shall have seized under or by virtue of the process *out of his hands* Now, when the sheriff has transferred the goods seized under an attachment in insolvency, in discharge of his duty under the process placed in his hands, to the official assignee in insolvency, they came into his hands and could only be detained therein *as and if they are the property of the insolvent.* In no other event can the official assignee retain the goods. He becomes liable to the true owner, from whom they were wrongfully taken, not by reason of the original wrongful taking, but by reason of his own wrongful detention of goods not belonging to the insolvent after a demand made for them upon him by the true owner, from whom they had been taken. Such wrongful detention cannot be justified by the assertion that the sheriff, who had wrongfully seized the goods had given them to the assignee If the goods were now in the hands of the sheriff, he, to set himself right with the true owner, and to protect himself from an action, might unhesitatingly restore the goods to the owner When the official assignee, to whom he has delivered them (upon demand being made upon him by the true owner), refuses to restore them, *he* becomes a wrong-doer himself, wholly independently of the sheriff and of the wrong committed by him, and must be responsible for his own acts.

The affidavits and argument upon the appeals leave no doubt on my mind that these are cases in which I have a discretion enabling me to grant writs of replevin, and that I properly exercise that discretion by granting them, which I therefore do without further delay, to enable the official assignee, if so advised, to have *my judgment* reviewed by the court during the present Term; and as the Act of 1860 enables me to direct that a bond may be taken in less than treble the amount of the property I think it proper to limit the amount to a sum not exceeding four thousand dollars in each case. The orders of Mr. Dalton will therefore be set aside, and the orders will go for the writs of replevin.

Warren v. Cotterell.

Married Women's Act. 1872—*Ejectment*—"*Separate tort.*"

Under the Married Women's Property Act, 1872, a wife may be the sole defendant in an ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the Province.

[Chambers, April 20, 1872.—*Mr. Dalton.*]

This was an action of ejectment to recover possession of the east half of lot 86, in the first concession of the township of West Zorra.

On the 18th April, and before any appearance was entered,

T. Ferguson obtained a summons calling upon the plaintiff to show cause why the writ of summons herein, and the copy and service thereof, should not be set aside with costs on the ground that the sole defendant named in the said writ is a married woman, and that the land in question does not belong to her, but to her husband. He referred to Cole on Ejectment, page 84.

No cause was shown; but as it appeared that the action had been commenced after the passing of the Married Women's Property Act, 1872 (35 Vict. cap. 16, Ont.), judgment was reserved, for the purpose of considering the effect of that statute. On the 20th April, judgment was delivered by

Mr. Dalton.—The facts of this case seem to be, that the sole defendant is a married woman, whose husband has gone to reside permanently in the State of Michigan. The motion is to set aside the writ of ejectment, copy and service, because the husband is not joined as a defendant. The wife is, in fact, "the person in possession," and the motion is not grounded on a denial of this, but on the alleged necessity that the husband should be joined in an action against the wife. As to the necessity of this, in ordinary cases there can be no question; but whether it applies to ejectment may perhaps be doubtful, from the peculiar nature and object of the action. In ordinary actions it has hitherto been applicable, even to this extent, that where she is sued for her own separate debt, and does not defend, a judgment signed against her alone will be set aside. No cause having been shown to this summons, it does not appear how or when the present defendant acquired possession; and I am not aware of any case under our Ejectment Act in which this question has arisen, except one in Chambers some months ago, where I set aside the process on account of the non-joinder of the husband. Under the old Ejectment Act, the point could never have arisen, and in practice the difficulty is lessened by the fact that where the husband is permanently resident abroad, service may be made upon the wife for him (Tidd's Prac. 9th Ed. 1210-1). Here the wife, and not the husband, is the person in possession, and the plea of non-joinder would be a plea in abatement.

In the action of ejectment, which is unlike any other, the defendant is in possession of the specific land sought to be recovered, and the plaintiff, by his writ, alleges that possession to be unlawful. Can the defendant in such a case merely set up matter in abatement, and offer no defence on the merits? Can he say, as this defendant practically does, "This may indeed be your land, but you cannot sue me for its recovery"? It seems an extraordinary thing that a person can retain possession in person of the land of another, and yet, even while standing upon it, deny the right of the owner to pursue his legal remedy without joining some one else who is not in possession, and is, in fact, out of the country.

In *Bissill* v. *Williamson*, 7 H. & N. 895, Baron Bramwell says, "In ejectment there never can be any proceeding analogous to a plea in abatement; for the plaintiff in his writ, says, 'I am entitled to possession,' and therefore matter in abatement can be no reason for defendant holding the land." The form of action which bears the strongest analogy to ejectment is replevin, in which one man claims and another defends possession of a specific chattel. In this action no plea in abatement is allowed, unless it alleges matter which gives the defendant a title to the return of the chattel (Gilbert on Distress, 146). In ejectment the possession is not, indeed, given to the plaintiff, as is the case in replevin, where "the deliverance of the goods is immediate, so that the plaintiff hath possession before the defendant can plead thereto" (Gilbert, *loc. cit.*); but both forms of action, being for the recovery of a specific thing, are in this respect identical. The Married Women's Property Act, 1872, meets the case exactly, section 9 providing that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or *torts*, as if she were unmarried." Now the tort here complained of is the unlawful possession of this land, which possession is held by the wife alone. This is therefore her "separate tort;" and the action having been commenced since the passing of the statute, I think the application must fail.

Summons discharged without costs.

CHANCERY CHAMBERS.

(*Reported by* Thomas Langton M.A., *Student-at-Law.*)

Re S. & M., Solicitors.

Next friend—Statutes—35 Vict., c. 16 (Ont.)—Solicitor—Taxation—Delivery of bills of costs.

The Act of 35 Vict., c. 16 (Ont.), which gives power to a married woman in certain cases to sue and be sued alone, does not prevent her husband being considered as *dominus litis*, and the suit his suit, if she joins him as a party plaintiff; nor does it obviate the necessity for a next friend in order to bind her.

It is the policy of the Court that a solicitor is bound by his original delivery of bills of costs to his client, and it is not competent for him to make a qualified or conditional delivery of a bill, which would, even by a reservation in express terms, enable him to deliver subsequent and more complete bills in the event of recourse being had to taxation.

[Chambers, August 26, 1872.—*The Chancellor.*]

This was an appeal by *Spencer* from an order of the Referee made upon the petition of clients for the taxation of solicitor's bills. He took the preliminary objection to the petition that it was made by two married women and their husbands, without the intervention of next friend for the married women, and contended that an order made upon such a petition would not bind the married women who might by next friends subsequently take proceedings for a second tax-

ation, citing *Dan. Prac.* (4th ed.) p. 109-11, *Re Waugh*, 15 Beav. 508, *Pearse* v. *Cole*, 16 Jur., 214. He also read affidavits to shew that the bills of costs had been hurriedly prepared for the convenience of the clients in forming an estimate of their amount with a view to a settlement; and had not been delivered in a formal way for taxation, but an express reservation had been made of a right to deliver other and more complete bills in the event of a taxation. He therefore contended that this was a qualified delivery which did not bind a solicitor, and which it was competent for him to make.

Hamilton for the petitioners. As to the objection with regard to the want of next friend, it is only necessary to have one to secure costs, and this necessity could not arise when there are moneys of the clients in the solicitor's hands: *Re Curran* 2 Ch. Cham. 305. Furthermore, since 35 Vict., c 16 (Ont.), no next friend is required (secs. 1 & 9), and so the Referee had held in *McAllister* v. *Timlin*. (A report of this case is to be found in the *Daily Mail* of 29th May and 15th June, 1872.) It was not competent for solicitors to deliver bills not intended for taxation. On this point he cited *Re Pender*, 8 Beav. 299; *Re Chambers*, 34 Beav., 177; *Re Carven*, 8 Beav. 436; *Re Andrews*, 17 Beav. 510; *Re Whalley*, 20 Beav. 576; and *Re Crawford and Crombie*, 2 Ch. Cham. 18.

Spencer in reply. No objection had at the time been made by the clients to receive the bills conditionally. No solicitor could venture to let his client have an approximate bill if he was to be bound by any delivery.

The Chancellor. — I said at the close of the argument that I thought the first objection must prevail. The rule is that when husband and wife join in any pleading or proceeding the husband is considered to be *dominus litis*, and the wife is not bound; so if in this case there were a taxation upon this petition it would be nominally at the instance of two married women, together with their husbands and others; but it would not prevent the married women having another taxation. The Act of last session does not appear to me to touch that question. It enables a married woman in certain cases to sue alone. In this case the petitioner joins husbands and wives as having a joint interest. As a fact the married women are not suing alone. I cannot assume that this a case in which they can do so. I am asked by petitioner to strike out the name of the husband. The interests of the parties are not so before me that I can say that the husbands are not properly and necessarily joined, and I certainly ought not to do what is asked upon this appeal.

Upon the second point, I said that it is a matter of policy to bind solicitors by bills that they deliver. The bill delivered is subject to taxation, and the solicitor is not at liberty to withdraw it, or to substitute another bill for it, at any rate after an order for taxation, without leave of the Court, which is only granted upon special grounds. It is contended that here there was no absolute delivery of a bill, but that a bill of items was sent to the clients with an express reservation that if not accepted, and if a taxation were desired by the clients, the solicitors reserved to themselves the right to make out and deliver their bill (a reason for this is given in the affidavit of Mr. McDonald). The question is, whether it is competent to a solicitor to reserve such a right upon the delivery of a bill. There are some reasons against it. If he can do so in one case he can do so in all; and of course if one solicitor can do this all may do it, and thus the rule that a solicitor is bound by his bill delivered might be virtually abrogated. On the other hand, it is convenient sometimes that a solicitor should be at liberty to deliver what may be called an approximate bill. His client may desire to be informed approximately of how he and his solicitor stand, and the solicitor might deliver it with an intimation that if paid without taxation he is content to receive the amount, but if taxation were desired he would deliver another and a fuller bill. I think this is open to some serious objections. It operates to discourage taxation—the solicitor offers a premium to his client to abstain from the exercise of that right. It is asking the client to decide blindfold, for in ninety-nine cases out of a hundred the client cannot know whether the bill is correct or not. It places his client in a certainly difficult position. He is asked to pay a demand, of the justice of which he can know little or nothing, upon pain of having the demand increased if it is not paid; and the client, rather than run such a risk, may be induced to pay a bill which is really more than he ought to pay. As a matter of policy ought not a solicitor to be prevented from placing his client in such a position? It may be considered that the client should refuse to receive a bill thus conditionally delivered; but a client is seldom aware of his rights; and the rules in relation to the delivery and taxation of bills between solicitor and client are framed mainly for the protection of the latter. The observations of Lord Langdale, in *Re Pender*, 8 Beav. 304-5, are not inapposite in the case before me. A solicitor had delivered bills not signed by the solicitor, so that he was not in a position to sue for their recovery; and the client having obtained an order for their taxation, the solicitor moved to set it aside, on the ground that it was not within the Solicitor's Act, 6 & 7 Vic. The Master of the Rolls held the bills within the Act, and added these observations (p. 304): "But if a bill delivered without being signed is not taxable, the solicitor may charge what he pleases with impunity: he may in the first instance deliver a bill not signed to an amount far beyond what he is entitled to, and take his chance of obtaining payment without taxation, in which case he will in most cases succeed; but if he should fail, which may possibly happen, and his bill, according to the hypothesis, is not to be taxed, he will say, as has been said, 'It was not delivered with a view either to an action or to taxation, but for the purpose of amicable discussion and arrangement.' He will then deliver a signed bill for what is justly due to him, excluding the gross overcharges in the bill delivered but not signed, and so escape paying the cost of taxation. In this supposed case his attempt has failed, but it has cost him little or nothing, and, by obtaining payment of other bills not signed or taxed, he may console himself for the disappointment in

the particular instance." Certainly much of the evil pointed out by Lord Langdale might result from the delivery of bills by solicitors which they were at liberty to withhold upon any ground from taxation His Lordship proceeded upon the construction of the Act, adding, "It ought to be observed that any other construction of the Act would facilitate the practice of great fraud and oppression," and he then proceeded to point out how this would be in the language that I have quoted. It is not contended on behalf of the solicitor in this case that the bills delivered were not taxable under our statute unless saved from taxation by the reservation made by the solicitor who delivered them. There is language of the same learned judge in another case, *In re Carew*, *supra*, which applies with more or less force to this case, according to the sense in which certain words are used. He says: "I must take leave to say that if a solicitor has delivered his bill he is bound by it, and the taxation must be on that bill; he is not entitled as of course to reduce his demand, or to reserve the power of delivering a bill containing other charges. I conceive that a most improper object." If by reason of the words, "reserve the power," is meant that he cannot expressly reserve the power, that is this case; if by the words is meant "he cannot have the power in reserve," it is not a direct authority against an express reservation of the power, but it is an authority against the policy of allowing such a power to be reserved.

What was done by the solicitor in this case was to append to the foot of each bill this memorandum: "In the event of a taxation being applied for in this case we reserve to ourselves the right of delivering another and more complete bill," and underneath is written the partnership name of the solicitor, and the solicitor's agent at Woodstock says that before delivering the bills to the two clients to whom or to one of whom he delivered them, he said that the solicitors reserved to themselves the right of making up and delivering more full and complete bills of costs. The solicitors now put it that there was no absolute delivery to the clients of the bills of costs; but only a qualified or conditional delivery, and that the clients should have objected to receive them if they were not content so to receive them. I inclined at first to agree with the solicitors, but upon examining the exact terms of the memorandum, and of what was said by the agent to the clients, the delivery of the bills does not appear to me to have been a conditional one. The memorandum treats the delivery as an actual delivery of a bill of costs, and speaks of another delivery of another bill, and the message of the agents to the clients was to the same effect The question now is, whether the solicitors can in this way take themselves out of the general rule. They have delivered bills asserting a right which they said they reserved to deliver other bills. They had, in fact, no such right as they so claimed to have. How is such a delivery of bills of costs to be regarded? It was not a delivery for the purpose of taxation. Can the clients use it for the purposes of taxation, because it is a bill delivered, and the statute enacts that bills delivered shall be taxable? Apart from the policy of the law, and if this was a transaction not connected with bills of costs, I should hold the parties to whom these papers were delivered not entitled to use them for any purpose from which they were in terms restricted from using them. But the subject matter being bills of costs, and the policy of the law being in my judgment against the delivery of them with the restriction which the solicitors have attempted to put upon their delivery, the question presents other considerations. Is there any way of carrying out the policy of the law, and preventing the mischiefs pointed out by Lord Langdale and others to which I have referred, except by holding the solicitor's attempted restriction upon the ordinary right of the client upon the delivery of a bill of costs to be inoperative? I confess I think it necessary to go to that length. I found myself entirely upon the policy of the law which could in any case be defeated if solicitors were to be at liberty to annex to the delivery of their bills of costs such a restriction as has been attempted in this case. There is no hardship upon the solicitor in this. If there is any good reason why they should not be bound by their bills delivered by them the Court will, in a proper case, relieve them and allow them to deliver other bills, or to amend those already delivered. That would be a matter in the discretion of the Court. What has been attempted here has been to substitute for the discretion of the Court, under the name of reserving a right, the act of the solicitor himself. I think it right to meet this attempted innovation at the threshold, and to say at once that it cannot be

Since writing the foregoing, I have referred to the case of *In re Chambers*, 34 Beav. 177. A bill of costs had been delivered, and after some objections and some discussion the solicitors delivered a new bill of costs, giving notice that he abandoned the first bill and substituted the second. The client then took out an order to tax the first bill. The solicitor moved against it, and the question was, whether the solicitors could substitute the second bill and have that bill taxed, and the Master of the Rolls held that he might. That case differed from the one before me in this, that here there have been no bills but the one set delivered, and that there has been an order for taxation; while in that case there was no order to tax until after the delivery of the second bill. The language of the Master of the Rolls in giving judgment is against the solicitor. In this case "I am of opinion that a solicitor cannot deliver his bill with items of overcharge, and say, 'I do not intend this to be my bill, but if objected to I intend to deliver another.' This is precisely what the solicitors in this case have done." He goes on to say, "Nor after a bill has been once referred for taxation, when he finds that items in it will be struck off, can he deliver another bill of costs. But the circumstances of this case are different, for the substituted bill was delivered before the service of or notice of the order to tax. Lord Langdale held, and I have also held, that a solicitor cannot substitute as a matter of course a second bill for the first; but I have not held that you never can do it." Looking at the previous part of the judgment, that "a solicitor cannot deliver a bill and say, 'I do not intend this to be my bill, but if objected

to I intend to substitute another,'" I should say that his lordship has not held that an attempted reservation of right to substitute another bill for the one delivered would not be a ground for creating an exception. I cannot help thinking that *In re Chambers* in itself created a dangerous precedent It is, however, distinguishable from the case before me in the particulars that I have pointed out It is no matter of doubtful policy that a solicitor should be held to the bill that he has once delivered, unless he gets the leave of the Court to alter it. There can be no better authority than Lord Langdale upon questions of this nature; and in *Re Pender* he has explained the policy of the law, and the reason for it, very clearly I think that solicitors should not be allowed by any device or in any shape or way, to contravene the policy of the law. I shall of course be understood as not imputing any intentional impropriety to the solicitors in this case. I have reason to believe that they meant no wrong.

The order made by the learned Referee in Chambers does not conclude the solicitors. It is made without prejudice to any application they may make for leave to deliver substituted bills of costs; the learned Referee only held that they could not as a matter of right, of their own notice without leave, substitute other bills for those delivered, and in that I think, for the reasons I have given, that he is right. As to the costs of this application, each party succeeds as to one point, I think there should be no costs.

DIVISION COURTS.

In the Third Division Court in the County of Elgin.

Oakes v. Morgan.

Nonsuit after payment of money into Court—Div. Ct. Rule 130—Impounding money for defendant's costs.

[St. Thomas, Aug. 19, 1873.—*Hughes, Co. J.*]

This was an action to recover an account claimed for work and labour. At the trial the plaintiff proved a special executory contract to serve defendant for a fixed period not performed on his part, but sought to recover as upon a *quantum valebat* for the time he had worked as plaintiff's hired servant. The defendant paid a specific sum into Court, less than plaintiff's claim. The plaintiff was, on his own evidence, nonsuited at the trial because he proved he had failed to perform his contract.

After the sitting, *E. Horton* (who acted as counsel at the trial) applied for an order to set aside the nonsuit, and for a new trial on the following grounds:—

1st That the payment by the defendant into Court was an admission that defendant was indebted to the plaintiff in at least that sum.

2nd. That the ordering a nonsuit when money had been paid into Court was unjust and unprecedented.

3rd. That the plaintiff was and is entitled under the circumstances to the amount paid into Court, and acknowledged to be due from defendant to him.

W. J. White, attorney for defendant, shewed cause, and cited the several authorities hereinafter referred to, contending that the nonsuit was right, and that the money paid into Court could not be taken out by the plaintiff, as the practice of a court of record permits, because the 130th General Rule of 1869 provides against that practice; that it is in fact to be retained by the clerk until the final result of the cause; that it may be impounded to abide the order of the judge who may order it to be applied in discharge of defendant's costs.

No one appeared to support the application.

Hughes, Co. J., delivered the following judgment:

The payment into Court was an admission that the defendant owed the plaintiff $8 and no more. The plaintiff proceeded with his claim for, and undertook to prove his right to recover more, in fact the whole of his demand, and would not accept the $8 in full; he, however, proved at the trial, he was not entitled to any sum whatever.

After payment of money into Court there may be a nonsuit in a court of record, and that this is sustained by precedent, there is abundance of authorities, if authorities are required. *Gutteridge* v *Smith* was the leading case on the subject, 2 H Bl 374; 2 Esp. 482. n. It was formerly held that after tender, plaintiff could not be nonsuited, but it is now settled that plaintiff may be nonsuited after a plea of tender: *Anderson* v. *Shaw*, 8 Bing 290 The 69th section of the Division Courts Act applies the principles of practice of the Superior Courts to the Division Courts in cases not otherwise provided for. The 130th Division Court Rule of 1869 makes the practice different with regard to plaintiff's right to take the money out of a Division Court, from that which is the practice in the Courts of Record. The rule provides that it is *not* to be paid out to the plaintiff until the final determination of the suit unless the judge shall otherwise order; the object of that rule is quite obvious; so that the grounds stated for setting aside the nonsuit herein are untenable. Besides this, I do not see how I could be expected to grant a new trial, when upon the plaintiff's own shewing the merits of the case are entirely against his right to recover any sum whatever, the application ought rather to have been for me to grant an order for the clerk to pay over (after deducting defendant's costs) the balance of the amount paid into Court, to the plaintiff.

The authority shewn by Mr. White, 2 Chit. Arch. Pr. (9 ed.) 1283, lays it down that the Court or a Judge, may, if the plaintiff fails in his action, and the money has not been taken out of Court by him, impound it to answer the defendant's costs.

I shall, therefore, order the application for a new trial to be discharged and the money paid into Court to be impounded to pay the defendant's costs; and after those costs are satisfied the balance to be paid to the plaintiff.

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

Holland and another v. Hodgson and another.

Trade fixtures—Mortgagee and assignee of bankrupt—Looms attached to the freehold.

Where an article is affixed to the soil by the owner of the fee, though only by means of bolts and screws, it is to be considered as part of the land; at all events, where the object of setting up the article is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied.

Trover for looms by mortgagees against the assignees of M., a bankrupt, the mortgagor. M had carried on the business of a worsted spinner. By a mortgage, dated 1869, he conveyed to the plaintiffs in fee the said mill, in which he carried on his business, "and also all the steam-engine, shafting, going-gear, machinery, and all other fixtures whatever, which now or at any time hereafter during the continuance of this security shall be set up and affixed to" the premises. The defendants subsequently, on M. becoming bankrupt, were chosen as his assignees, and as such took possession of and sold the looms on the premises; and it was in respect of this conversion that this action was brought. The looms were placed in various rooms in the mill. They were driven by steam power, which gave motion to the shafting and going-gear, from drums on which the required communication was given to the looms by means of leather bands, which could be applied to or disconnected from the looms at pleasure. It being necessary for the working of the looms that they should be kept steady and perpendicular to the line of shafting, they were annexed to the floor by means of two nails driven through their feet. After the nails had been driven in, the looms could not be moved without drawing the nails, but this could easily be done without any serious injury to the floors. It was not necessary that the nails should have heads, although, as a fact, they had either flat or square bolted heads; but spikes without heads would have equally answered the purpose; and if such spikes had been used, the looms could have been lifted up and removed, and put back again, without disturbing the spikes. The mortgage deed was not registered under the Bills of Sale Act

Held, (affirming the decision of the court below), that the looms were fixtures, which passed with the freehold under the mortgage.

Longbottom v. *Berry* (22 L. T. Rep. N. S. 385; L. Rep. 5 Q. B. 123), affirmed.

[22 L. T. N. S., 709.—May 23, 1872.]

Error from the Court of Common Pleas.

The declaration was in trover for looms and other fixtures. Pleas, not guilty, and payment into court of a sum that did not cover the value of the looms. Replication, damages *ultra*.

The court below having decided, on the authority of *Longbottom* v *Berry* (22 L. P. Rep. N. S. 385; L. Rep. 5 Q. B. 123), in favour of the plaintiffs' right to recover the value of the looms, the defendants brought error, and the following case was stated accordingly for the opinion of the court:

1. George Mason, of Horton, near Bradford, in Yorkshire, in the year 1869, carried on the business of a worsted spinner and stuff manufacturer at Bank Top Mill, at Horton aforesaid, of which he was the owner.

2. By a mortgage, dated the 7th April, 1869, the said George Mason conveyed to the plaintiffs in fee the said mill, with several closes of land, cottages, and other hereditaments and premises therein described, the parcels thereof, so far as they relate to the said mill, being as follows:—"All that worsted mill lately occupied by the firm of Messrs. Thomas Ackroyd and Sons, situate at Horton Bank Top, in the parish of Bradford, in the county of York, with the warehouse, counting house, engine house, boiler house, weaving shed, warehouse, gas works and reservoirs belonging, adjoining or near thereto; and also the steam engine, shafting, going gear, machinery and all the fixtures whatever, which now or at any time hereafter during the continuance of this security, shall be set up and affixed to the said hereditaments and premises hereby granted and assured, or intended so to be, or any part thereof." The said deed, which may be referred to by either party, was not registered under the Bills of Sale Act.

3. The said George Mason, by a deed, dated 3rd July, 1869, assigned to the defendants all his estate and effects, to be administered as if under a bankruptcy. The said deed was duly registered, and everything happened to make it a valid deed under section 192 of the Bankruptcy Act 1861, and the clauses of the Bankruptcy Amendment Act 1868, relating to such deeds.

4. Under the last mentioned deed, the defendants took possession of, and sold, amongst other things in the said mill, the property mentioned in next paragraph as claimed by the plaintiffs. Other articles, both in the Bank Top Mill and in another mill which had also been mortgaged by the said George Mason to the plaintiffs, have been in dispute between the plaintiffs and the defendants, but by abandonment of some claims, and payment into court as to others, the matters in dispute are now reduced to the articles mentioned in the next paragraph.

A copy of the pleadings accompanies and forms part of this case.

5. The plaintiffs claim the following articles as passing by the words of the deed of 7th April, 1869, set out in the second paragraph:

A. 486 looms, sold at	£1,038	4	0
B 14 Jacquard engines, sold at	9	2	0
C. 660 shuttles, sold at.....	19	8	4
D. A drill, sold at	32	0	0

6 The looms, which are machines for weaving worsted stuffs and other fabrics, were placed in various rooms in Bank Top Mill, some on the ground floor and some on the first floor. In all cases they were driven by steam power, which was applied to them in the following manner: The steam engine worked or gave motion to the shafting and going-gear, which consisted of long shafts passing from one end to the other of each room, and having fixed upon them at proper intervals large concentric wheels called drums, from which the required motion was communicated to the looms by means of leather bands, which could be applied to or disconnected from the looms at pleasure. The steam engine and the shafting and going-gear were unquestionably fixtures, and passed as such to the plaintiffs under their said mortgage.

The looms slightly varied in size, but each was about 7ft. long by 8ft. wide, and from 3ft to 4ft. high, and weighed about 7 cwt. or 8 cwt. Each loom stood upon four feet, one at each corner, each foot being a flat piece of iron about 3in. long by 1½in. broad, with a hole drilled through it about ⅜in in diameter. It is essential to the proper working of a loom that it should stand

on a level and be steady, and keep its true direction perpendicular to the line of the shafting. If it merely rested by its own weight upon the floor, it would be liable in working to be shaken and drawn sideways from the true line. In order to keep the looms in question steady and in their proper position for working, the following methods were adopted:

In the case of the looms which were in rooms on the ground floor (the floors of which rooms were formed throughout of stone flags), the method adopted was as follows: holes about half an inch or three-quarters in diameter were drilled or cut in the stone floor, in the places where two of the four feet of each loom, at opposite corners, would stand. Into each of the holes was driven a plug of wood, so as to fill it up completely, and make it a tight fit. Then the loom was placed in position and brought to a proper level by thin pieces of wood, packed where necessary under the loom feet, and then a nail about four inches long, in some cases with a flat head, and in others with a square bolted head, was driven through the hole in the loom foot into the wooden plug. The other two feet of each loom were left free.

In the case of the looms which were in rooms on the upper floors, the method adopted for keeping the looms steady and in their proper position for working, was somewhat different. The floors of these rooms, like the others, were principally formed of stone flags, but beams of wood about four inches wide and three inches thick were built into the floor along the lines upon which the loom feet stand, and the nails used for keeping the looms in these rooms steady and in their proper position for working, were driven at once into these beams instead of into wooden plugs, as in case of the looms in the ground-floor rooms. The rooms in the upper floors were built and arranged specially to receive the looms, and the purpose for which the beams were introduced was to supersede the necessity of drilling or cutting holes for the wooden plugs. After the nails had been driven into the wooden plugs or beams, as above described, the looms could not be moved without drawing the nails from the wooden plugs and beams; but this could easily be done without any serious injury to the floors. It was not necessary for the purpose of keeping the looms in their proper position for working, that the nails so driven into the wooden plugs or beams as above described should have heads. Spikes without heads would equally have answered the purpose, and if such spikes had been used the looms could have been lifted up and removed, and again placed in their proper position for working, without disturbing or removing the spikes. Patterns of a loom foot, and of two or three of the nails or bolts used to keep the looms in question steady and in their proper position for working, will be in court on the hearing of this case, and may be referred to by either party. A photograph of a loom marked A accompanies and forms part of this case.

7. The Jacquard engines were machines used in conjunction with the looms as above described, when it was required to use the looms for weaving worsted stuffs or other fabrics with patterns. When so used, they were simply screwed on the top part of the looms, and were not otherwise attached to the mill than were the looms themselves.

8. The shuttles are wooden instruments about eight inches long, so shaped as to carry the bobbins or reels on which the yarn or thread to be used for weaving worsted stuffs or other fabrics in the loom is wound. They are used in the process of weaving, and when used are shot backwards and forwards horizontally by the action of the loom, carrying the yarn or thread at each throw between the warp.

The shuttles are of no use without the loom, and the loom cannot be used for weaving without the shuttles; but the shuttles have an entirely distinct and separate existence from the looms, and form no part of the looms, and by breaking the yarn or thread can be removed from them at any time. Patterns of a shuttle and of a bobbin or reel will be in court on the hearing of this case, and may be referred to by either party.

Some of the shuttles in question were actually in the looms now in question at the time of their being taken possession of. The remainder were spare shuttles provided for use when wanted. Those which were so actually in the looms were sold by the defendants for 10*l.*, and the remainder for 9*l.* 3*s.* 4*d.*

9. The drill was a large machine for drilling holes in iron and other metals. It was about eight feet high, and stood on a three-cornered base or foot about five feet long on two sides, and three feet long on the third. It was worked, like the looms, by means of a leather belt, which ran upon the permanent shafting, and was capable of being applied to and disconnected from the drill at pleasure. It was so heavy that it was capable of being worked without being fixed or attached to any part of the mill; but when it was removed by the defendants it was bolted to the floor at one corner by an iron bolt about five inches long, passing through a hole in its base or foot. This bolt was secured by a flat head at the top, and at the bottom was screwed into a nut, which was let into the under side of one of the flagstones of the room in which it was placed. By unscrewing the bolt the drill could be removed. Its weight was about two tons.

The value of the different articles in question are to be taken to be the amounts for which the same were sold as above stated.

10. Amongst the articles in the Bank Top Mill which were sold by the defendants, and which were claimed by the plaintiffs under this said mortgage (but as to which there is now no dispute between the parties, the defendants having paid the money into court in respect of the same), there were several articles of machinery besides the steam engine and the shafting and going-gear, which were unquestionably fixtures, and passed as such to the plaintiffs under the said mortgage.

11. The question for the opinion of the court is, whether any and which of the articles now in dispute passed to the plaintiffs as against the defendants, and according to such opinion judgment is to be entered up on the issue joined on the replication for the plaintiffs for such sum as

the court may direct, or for the defendant; in either case with costs.

Afterwards, on the 5th June, 1871, come here the parties aforesaid, and the court is of opinion that the judgment should be for plaintiffs, except as to shuttles and Jacquard looms mentioned in the said special case. Therefore it is considered that the plaintiffs do recover against the defendants the sum of 1,070*l* 4*s*. and their costs of suit.

The 7th June, 1871.—The defendants say that there is error in law in the record and proceedings in this action, and the plaintiffs say there is no error therein.

The grounds of error intended to be argued herein are, that the looms and drill did not pass to the plaintiffs by the deed of the 7th April, 1869: that the said looms and drill were not fixtures, and were not machinery within the meaning of that deed: that if the said looms and drills passed by the said deed, such deed was, as regards the said looms and drill, void as against the defendants, by reason of the same not having been registered under the Bills of Sale Act.

The following are the points for argument on behalf of the plaintiffs (defendants in error): First, the deed of the 7th April, 1869, passed the looms and drill, and also Jacquard engine and shuttles; secondly, the said articles were fixtures and machinery within the meaning of that deed; thirdly, the said articles passed as part of the freehold, and consequently the deed of the 7th April, 1869, did not require registration under the Bills of Sale Act.

Field, Q. C. (*Kemplay* with him), for the appellants (the defendants).—The question raised in this case is, whether these looms, being used by a manufacturer (the mortgagor) in his mill, and attached to the floor in the way stated in the case, passed to the mortgagee as part of the freehold. If the looms remained mere personal chattels, then, though they might pass under the mortgage as fixtures, yet, as the mortgage deed was not registered under the Bills of Sale Act, it does not hold good as against the defendants. In the court below the rule to enter the verdict for the defendants was, without argument, at once discharged on the authority of *Longbottom* v. *Berry* (22 L. T. Rep. N. S. 885; L. Rep. 5 Q. B. 123), from which it could not be distinguished. This appeal, then, though in form an appeal from the Court of Common Pleas, is in reality an appeal from the Court of Queen's Bench. The real question is, whether these looms ever became part of the freehold. The only difference between this case and *Longbottom* v. *Berry* is that here spikes could be used to keep the looms in their places; in other respects the two cases are undistinguishable. The decision in *Longbottom* v. *Berry* is a departure from the true rule of law. The true rule is laid down by Parke, B., in delivering the judgment of the court in *Hellawell* v. *Eastwood*, 6 Ex. 295. That was a case where some "mules" for spinning cotton had been taken as a distress, and the question arose whether these "mules," when fixed, became part of the freehold. "This," said Parke, B., "was a question of fact, depending upon the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the frame, and the extent to which it is united to them, whether it can be easily removed, *integre*, *salve et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causa*, or in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel." That doctrine was cited and approved of as good law by the Court of Queen's Bench in *Parsons* v. *Hinde* (14 W. R. 860); it was also cited with approval by the same court in *Turner* v. *Cameron*, 22 L. T. Rep. N. S. 525; L. Rep. 5 Q. B. 306 [Blackburn, J., cited *Mather* v. *Fraser*, 2 Kay & J. 536] In *Walmsley* v. *Milne*, 7 C. B. N. S. 115, the court did not impugn the authority of *Hellawell* v. *Eastwood*; the judgment there proceeded on the conclusion in point of fact that the mortgagor had annexed the articles in question to the freehold for the purpose of improving the inheritance. In *Waterfall* v. *Penistone*, 6 E. & B. 876, *Hellawell* v. *Eastwood* was again cited, and approved as laying down the true rule. He cited also *Trappes* v. *Harter*, 2 C. & M. 153; *Climie* v. *Wood*, L. Rep. 3 Ex. 257; Ex. Ch. L. Rep. 4 Ex. 328; *Lancaster* v. *Eve*, 5 C. B. N. S. 717. It appears from a consideration of these authorities, that the true rule of law is that laid down by Parke, B., in *Hellawell* v. *Eastwood*, and, judged by that rule, the looms in this case were chattels, and did not pass by a conveyance of the freehold. As regards the mode of annexation, they were only so annexed that they might have been easily removed, *salve*, *integre et commode*, without injury to them or to the building; next, as regards the object and purpose of the annexation, that was simply and solely to keep the looms steady and perpendicular to the line of shafting. It was for the more convenient use of the looms, and not for the improvement of the mill as a mill. The steam engine, boiler, shafting and so forth, were, no doubt, as regards the object and purpose of their annexation, attached to the freehold, for they were put up for the more convenient use of the mill as a mill. The mill could not be used as such without the machinery and shafting gear; but the looms were not equally indispensable. To test the question in another way, these looms would not be ratable: *Reg* v. *Lee*, L. Rep. 1 Q. B. 241. He cited also *Wood* v. *Hewitt*, 8 Q. B. 913; *Fisher* v. *Dixon*, 12 C. & F. 312; *Gibson* v. *The Hammersmith Railway Co.*, 32 L. J. 337, Ch.; 8 L. T. Rep. N. S. 48; *Cullwick* v. *Swindell*, L. Rep. 3 Eq. Cas. 249.

Cave for the plaintiffs (respondents.)—The looms were intended to pass; secondly, they did pass, and as part of the freehold and not as chattels. What was mortgaged was a "worsted mill," and the mill can hardly be called a "worsted mill" without these looms: (*Haley* v. *Hammersley*, 30 L. J. 271, Ch.; see also Amos and Ferrard on Fixtures, p. 226, *et seq.*) Where the owner sets up looms like these, the presumption is that he does it for the improvement of the inheritance. In *Hellawell* v. *Eastwood* the question was between landlord and tenant. With regard to fixtures to which the tenant is entitled, as against the landlord, to take away at the end

of the term, they form part of the freehold nevertheless. "When chattels," says Parke, B., in *Hallen* v *Runder* (3 Tyrr. 959), "are thus fixed to the freehold by a tenant, they become part of it subject to the tenant's right to separate them during the term and thus to convert them into goods and chattels as stated by Gibbs, C.J., in *Lee* v. *Risdon* (7 Taunt. 191; 2 Mar. 495), and the very able work of Messrs. Amos and Ferrard on Fixtures; but whilst annexed they may be treated for some purposes as chattels, for instance, in the execution of a *fi. fa.* they may be seized and sold as falling under the description of goods and chattels" He cited, besides the cases cited for the defendants, *Ex parte Barclay*, 5 De G. M. & G. 403; *Boyd* v. *Shorrock*, 17 L. T. Rep. N. S. 197; 37 L. J. 144 Ch.. L. Rep. 5 Ch. 72; *Re Dawson*, 16 W. R. 424.

Field, Q.C., in reply.

Cur. adv. vult.

May 23.—BLACKBURN, J. delivered the judgment of the Court (Kelly, C.B., Blackburn, Mellor, and Hannen, JJ., Channell and Cleasby, BB.)—In this case George Mason, who was owner in fee of a mill, occupied by him as a worsted mill, mortgaged the mill and all fixtures, which then were or at any time thereafter should be set up and affixed to the premises, in fee to the plaintiffs The mortgage deed was not registered as a bill of sale, and Mason, who continued in possession, assigned all his estate and effects to the defendants, as trustees, for the benefit of his creditors. The defendants, under this last deed, took possession of everything The plaintiffs brought trover. The defendants paid money into court, and there was a replication of damages *ultra*. A case was stated showing the nature of the articles, and how and in what manner they were affixed to the mill. As the deed was not registered under the Bills of Sale Act. 17 & 18 Vict. c. 36, it was, by sec. 1 of that Act, void as against the defendants, as assignees for the benefit of creditors, so far as it was a transfer of "personal chattels" within the meaning of that Act. And as by sec. 7 the phrase "personal chattels" is declared in that Act to mean, *inter alia*, "fixtures," it was void (as against these defendants), so far as it was a transfer of fixtures as such Since the decision of this court in *Climie* v. *Wood* (*sup*), it must be considered as settled law (except perhaps in the House of Lords) that what are commonly known as trade or tenant fixtures form part of the land, and pass by a conveyance of it, and that though, if the person who erected those fixtures was a tenant, with a limited interest in the land, he has a right as against the freehold to sever the fixtures from the land, yet, if he be a mortagor in fee, he has no such right as against his mortgagee. Trade and tenant fixtures are, in the judgment in that case, accurately defined as "things which are annexed to the land for the purpose of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration." It was not disputed at the bar that such was the law, and it was admitted, and we think properly admitted, that where there is a conveyance of the land, the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale. But we wish to guard ourselves by stating that our decision, so far as regards the registration, is confined to the case before us, where the mortgagor was owner to the same extent of the fixtures and of the land If a tenant, having only a limited interest in the land and an absolute interest in the fixtures, were to convey not only his limited interest in the land and his right to enjoy the fixtures during the term so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V.C., in *Boyd* v *Shorrock* (*sup*), but merely as guarding against being supposed to confirm it. In *Climie* v. *Wood* (*sup*) the jury had found as a fact that the articles there in question were tenant's fixtures, and that finding was not questioned. Neither the Court of Exchequer nor the Court of Exchequer Chamber had occasion there to consider what would constitute a fixture. In the present case there is no such finding. The controversy was confined to the looms, the nature of which, and the mode of their annexation, are described in the case. In the court below it was properly admitted that there was no real distinction between those looms and the articles which the Court of Queen's Bench in *Longbottom* v. *Berry* (*sup*) decided to be so annexed as to form part of the land. Judgment was accordingly given for the plaintiffs without argument, leaving the defendants to question *Longbottom* v. *Berry* in a court of error. The present is therefore really, though not in form, an appeal against the decision of the Court of Queen's Bench in *Longbottom* v. *Berry*, and was so argued. There is no doubt that the general maxim of law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of annexation. Where the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel: (see *Willshear* v. *Cottrell*, 1 E. & B. 689, and the cases there cited) But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: (see *Deyncourt* v *Gregory*, L. Rep. 3 Eq 382.) Thus blocks of stone, placed one on the top of another, without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land; though the same stones, if deposited in a builder's yard, and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels On the other hand, an article may be very firmly affixed to the land, and yet the circumstances may be such as to show that it never was

intended to be part of the land, and then it does not become part of the land The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they are so intended lying on those who assert that they have ceased to be chattels; and that on the contrary an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde* v. *Waters* (16 Com B. 637) This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy this onus. In some cases, such as the anchor of the ship, or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord), have always been considered as part of the land, though severable by the tenant. In most, if not all of such cases, the reason why the articles are considered fixtures is probably that indicated by Wood, V C., in *Boyd* v. *Shorrock* (*sup*), that the tenant indicates by the mode he puts them up that he regards them as attached to the property during his interest in the property. What we have now to decide is as to the application of these rules to looms put up by the owner of the fee in the manner described in the case. In *Hellawell* v. *Eastwood* (6 Ex. 312) decided in 1851, the facts as stated in the report, are that the plaintiff held the premises in question as tenant of the defendants, and that a distress for rent had been put in by the defendants, under which a seizure was made of cotton spinning machinery, called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk in the stone floor and secured by molten lead poured into them. It may be inferred that the plaintiff, being the tenant only, had put up those mules, and from the large sum for which the distress appears to have been levied (2000*l*) it seems probable that he was the tenant of the whole mill. It does not appear what admissions, if any, were made at the trial, nor whether the court had or had not by the reservation power to draw inferences of fact; though it seems assumed in the judgment that they had such a power. Parke, B in delivering the judgment of the court says: "This is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law *perpetui usus causa*, or in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose of the more complete enjoyment and use of it as a chattel." It was contended by Mr. Field that the decision in *Hellawell* v. *Eastwood* had been approved in Queen's Bench in the case of *Turner* v. *Cameron* (*sup.*) It is quite true that the court in that case said that it afforded a true exposition of the law as applicable to the particular facts upon which that judgment proceeded; but the court expressly guarded their approval by citing from the judgment delivered by Parke, B. the facts upon which they considered it to have proceeded: "They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or themselves, and the object of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." As we have already observed, trade or tenant fixtures might, in one sense, be said to be fixed merely for a temporary purpose; but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant. The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed—of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B, of a carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop while he continued to sell his wares there. Subject to this observation, we think that the passage in the judgment in *Hellawell* v. *Eastwood* (6 Ex 312) does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The court, in their judgment, determine what they have just declared to be a question of fact, thus: "The object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels" Mr. Field was justified in saying, as he did in his argument, that, as far as the facts are stated in the report, they are very like those in the present case, except that the tenant who put up the mules cannot have been supposed to have intended to improve the inheritance, if by that is meant his landlord's reversion, but only at most to improve the property whilst he continued tenant thereof;

and he urged with great force that we ought not to act on a surmise that there were any special facts or findings not stated in the report, but to meet the case as showing that the judges who decided *Hellawell* v. *Eastwood* thought that articles fixed in a manner very like those in the case before us remained chattels; and this is felt, by some of us at least, to be a very weighty argument. But that case was decided in 1851. In 1853 the Court of Queen's Bench had, in *Willshear* v. *Cottrell* (1 E. & B 689), to consider what articles passed by the conveyance in fee of a farm. Amongst the articles in dispute was a thrashing machine, which is described in the report thus: "The thrashing machine was placed inside one of the barns (the machinery for the horse being on the outside,) and there fixed by screws and bolts to four posts which were let into the earth." *Hellawell* v *Eastwood* was cited in the argument. The court (without, however, noticing that case) decided that the thrashing machine, being so annexed to the land, passed by the conveyance It seems difficult to point out how the thrashing machine was more for the improvement of the inheritance of the farm than the present looms were for the improvement of the manufactory. And in *Mather* v. *Fraser* (2 K. & J. 286) Wood, V.C., who was there judge both of the fact and the law, came to the conclusion that machinery affixed not more firmly than the articles in question by the owner of the fee to land for the purpose of carrying on a trade there became part of the land. This was decided in 1856. And in *Walmsley* v. *Milne* (7 C.B., N S, 115), the Court of Common Pleas, after having their attention called to a slight misapprehension by Wood, V.C., of the effect of *Hellawell* v. *Eastwood*, came to the conclusion, as is stated by them at p. 131, "That we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose." The bankrupt was the real owner of the premises, subject only to a mortgage which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagee first erected baths, stables, and a coachhouse and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it, and to improve its usefulness as a stable. The malt mill and grinding stone were also permanent erections, intended by the owner to add to the value of the premises. They therefore resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell* v. *Eastwood*. It is stated in a note to the report of the case that on a subsequent day it was intimated by the court that Willes, J., entertained serious doubts as to whether the articles in question were not chattels. The reason of his doubts is not stated, but probably it was from a doubt whether the Exchequer had not, in *Hellawell* v. *Eastwood*, shown that they would have thought that the articles were not put up for the purpose of improving the inheritance, and from deference to that authority. The doubt of this learned judge in one view weakens the authority of *Walmsley* v. *Milne*, but in another view it strengthens it, as it shows that the opinion of the majority, that as a matter of fact the hay-cutter, which was not more firmly fixed than the mules in *Hellawell* v *Eastwood*, must be taken to form part of the land, because it was "put up as an adjunct to the stable, and to improve its usefulness as a stable," was deliberately adopted as the basis of the judgment; and it is observed that Willes, J. though doubting, did not dissent. *Walmsley* v. *Milne* (7 C B., N.S., 115) was decided in 1859. This case and that of *Willshear* v. *Cottrell* seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land—at all events, where the object of setting up the article is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. The threshing machine in *Willshear* v. *Cottrell* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same sense as the hay-cutter in *Walmsley* v. *Milne* was affixed to the stable as an adjunct to it, and to improve its usefulness as a stable. And it seems difficult to say that the machinery in *Mather* v *Fraser* was not as much affixed to the mill as an adjunct to it, and to improve the usefulness of the mill as such, as either the threshing machine or the hay cutter. If, therefore, the matter were now to be decided on principle, without reference to what has been done on the faith of the decisions, we should be much inclined, notwithstanding the profound respect we feel for everything that was decided by Parke, B., to hold that the looms now in question were, as a matter of fact, part of the land. But there is another view of the matter, which weighs strongly with us. *Hellawell* v. *Eastwood* was a decision between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather* v *Fraser*, which was a decision directly between mortgagor and mortgagee. We find that *Mather* v. *Fraser*, which was decided in 1856, has been acted upon in *Boyd* v. *Shorrock*, by the Court of Queen's Bench, in *Longbottom* v. *Berry*, and in Ireland in *Re Dawson*, Ir. L. Rep 2 Eq. These cases are too recent to have been themselves much acted upon, but they show that *Mather* v. *Fraser* has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather* v *Fraser*. It is of great importance that the law as to what is the security of a mortgagee should be settled; and without going so far as to say that the decision, only eleven years old, should be upheld, right or wrong, on the principle that "*communis error facit jus*," we feel that it should not be reversed unless we clearly see that it is wrong. As already said, we are rather inclined to think that if it were *res integra* we should find the same way. We think, therefore, that the judgment below should be affirmed.

Judgment affirmed.

EXCHEQUER.

Taubman v. The Pacific Steam Navigation Co.

Carriage by sea—Wilful act and default—Exemption of carrier from liability, under special contract.

A special contract, entered into between a shipowner and a passenger by sea, contained a provision that the shipowner would not be answerable for loss of baggage, "under any circumstances whatsoever."

Held, that such a stipulation covers the case of wilful default and misfeasance by the shipowner's servants.

Martin v. *Great Indian Peninsular Railway Company* (17 L. T. Rep. N. S. 349; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9) explained.

[26 L. T. N. S. 704, April 22. 1872]

The plaintiff became a passenger on one of the defendants' vessels from Rio Janeiro to England. On taking his passage he signed a contract by which the company engaged to carry him and his luggage upon condition, among other things, that the company would not be answerable for loss of or damage to the luggage "under any circumstances whatsoever." On the voyage the plaintiff's portmanteau was lost through the negligence of the defendant company's servants. The plaintiff brought an action for the loss of the portmanteau, averring in the declaration that the loss was occasioned by the wilful act and default of the defendants.

To this the defendants pleaded, setting out the terms of the contract.

Replication, that the defendants did not use proper skill and care, but were guilty of gross negligence and wilful default, and that, by reason of the said gross negligence and wilful default, the loss was occasioned, and demurrer to the plea.

Demurrer to the replication.

Garth, Q. C., with him, *Morgan Howard*, for the plaintiffs.—The act complained of is a wrongful act of the defendants' own doing, against the consequences of which no form of contract can protect them. The contract would protect the defendants in a case of ordinary negligence, but not in a case of wilful misfeasance or default. The courts have never held that a company could screen itself from liability in such cases, and it was to prevent such attempts that the Railway and Canal Traffic Act, 17 & 18 Vic t cap. 31, was passed. He cited *Peek* v. *The North Staffordshire Railway Company*, in the House of Lords. 8 L. T. Rep. N. S. 768; 32 L. J. 241, Q. B.; 10 H. L. Cas. 743; Story on Bailments, s. 549; *Martin* v. *The Great Indian Peninsular Railway Company*, 17 L. T. Rep. N. S. 349; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9.

Cohen, for the defendants, was not called upon.

Kelly, C. B.—The defendants in this case are entitled to our judgment. It is only necessary to read the contract in order to decide this case. The defendants are not to be liable for the loss of luggage "under any circumstances." This "gross negligence" of the defendants' servants is a "circumstance;" so is "wilful default." If the act had been actually done by the shipowners, the act would have been a trespass, whatever the contract might be. But this is the act of the servants, and the action is really one for breach of contract. *Martin* v. *The Great Indian Peninsular Railway Company* is distinguishable, for there the freedom from liability only extended to the time during which the baggage was to be in the charge of the troops.

Martin, B.—I am of the same opinion, as far as I can see from the imperfect statement of facts we have before us. The defendants are not under the liabilities of common carriers, and they are free to make any terms they choose. Probably the words in the special contract were inserted for the very purpose of exempting the company from liability for the acts of their servants.

Bramwell, B.—I am of the same opinion. *Primâ facie*, the defendants are not liable, for the contract says they are not to be liable for the loss of baggage under "any circumstances." A loss has occurred under certain circumstances, and the plaintiff is seeking to recover. Next we must consider, is there any implied exception? I am of opinion that there cannot be, for the parties could easily have expressed it: see the judgment of Maule, J., in *Borradaile* v. *Hunter*, 5 M. & G. 639; 12 L. J. N. S. 225, C. P. Then it is urged that in certain cases the Legislature have interfered. That, as far as it goes, is against the plaintiff's case. And the court will not extend the Railway and Canal Traffic Act further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament.

Cleasby, B.—What is the meaning of the word "circumstances?" I find in Johnson's Dictionary that the word "circumstance," in a legal sense, means "one of the adjuncts of a fact, which makes it more or less criminal." Arguing from this definition of "circumstance" by analogy, I should think the words in the contract will cover the present case.

QUEEN'S BENCH.

Wells v. Abrahams.

Trover—Felony by defendant—Defendant's application to set aside verdict.

In an action of trover for a brooch; pleas not guilty, and not possessed; the jury found a verdict for the plaintiff. Upon a rule for a new trial, on the ground that the facts alleged had established a felony by the defendant, and on the ground that subsequently to the verdict criminal proceedings had been instituted against the defendant:

Held, that those were not grounds for setting aside the verdict upon application of the defendant.

Wellock v. *Constantine*, 2 H. & C. 146, discussed and questioned.

[26 L. T. N. S.—May 2, 1871.]

This was an action for the conversion of a diamond brooch, tried before Lush, J., at the last Liverpool assizes. The defendant pleaded only not guilty. The jury found a verdict for the plaintiff; damages £150, the value of the brooch.

According to the evidence of the plaintiff's wife, she left a parcel of jewellery, containing amongst other things this brooch, with the defendant, who was a jeweller and pawnbroker, for the purpose of security for a sum of money she wanted to borrow. The defendant refused to advance the sum she required, and returned the parcel, but, as the plaintiff's wife alleged, the defendant abstracted and kept this brooch. Defendant and his son both asserted that the parcel did not contain such a brooch, but the jury found a verdict for the plaintiff. Criminal proceedings were afterwards commenced against

the defendant for stealing this brooch. Defendant had paid the amount of plaintiff's judgment and costs.

Torr, Q C., for the defendant, had obtained a rule nisi for a new trial on the ground that the evidence tended to prove a felony: and on affidavits of the facts subsequent to the trial, that is, a criminal prosecution for the felonious stealing of the brooch alleged to have been converted in the action.

Aspinall, Q C., for the plaintiff, shewed cause.
Torr, Q C., supported the rule.

The arguments upon the rule came on by way of motion, when the following were cited and discussed: *Crosby* v. *Leng*, 12 East. 409; *Stone* v. *Marsh*, 6 B. & C. 551; *Gibson* v. *Minet*, 1 H. Bl. 569; *White* v. *Spettigue*, 13 M & W. 603; 1 Hale, Pleas of the Crown 546; Com. Dig. "Action on case," B. 51; *Dawkes* v. *Coveneigh*, Styles 346; 1 Sm. L. C. 6th edit., 267; 9 & 10 Vict. c. 93, s. 1; *Harris* v. *Shaw*, Cas temp Ld. Hard. 349; *Wellock* v. *Constantine*, 2 H. & C. 146; *Markham* v. *Cobb*, Wm Jones, 147; *Gimson* v. *Woodfull*, 2 C. & P. 41; *Higgins* v *Butcher*, Yelv. 89 [See also Bishop's Criminal Law, vol. 1, sects. 653 to 663; and *Prosser* v. *Rowe*, 2 C & P. 421.]

Cockburn, C.J.—This rule must be discharged. There is a rule long established, in fact coeval with the law of England, that where a certain statement of facts discloses at the same time a civil injury to an individual and a public injury, the civil injury is suspended until there has been a prosecution by the party injured. That is the law; the question is, how is it to be enforced? It may be that the person against whom a prosecution is impending may plead that he is in the position of a felon, and may thus stop the civil action. I do not say so; it certainly would be to allow a person to allege his own criminality. To bring a civil action while the prosecution was going on may be oppressive. Under such circumstances, the court, as it is always willing to do, might, by the exercise of its summary jurisdiction, stay proceedings. Or suppose a person neglects to prosecute, preferring from selfish interest to bring a civil action, a public prosecutor might apply to the court to interfere and prevent his deriving the benefit of the fruits of his action. The only question in this case is whether my brother Lush ought to have interfered either by nonsuiting the plaintiff, or, if he refused to be nonsuited, by entering a verdict for the defendant. I cannot see whence he derives the power to do either. A judge at Nisi Prius has not the power of the court, nor is he always even a member of the court in which the action is brought. He is merely the instrument of the court to try the issue upon the record. Possibly he might refuse to try the cause. But when the cause has begun, the judge can only deal with the issues before him. In this case they were upon the pleas of not guilty and not possessed. The property was the plaintiff's, and the defendant had converted it. If he converted it *animo furandi*, the conversion would amount to a felony, and he would be liable to be prosecuted. Whether the conversion was felonious or not was a question of fact. How was the judge to direct a nonsuit, or how could he leave such a question to the jury? There was no such issue, and the judge had no power to do so. This is an application for a new trial on the ground that upon the facts the judge should have nonsuited, or entered a verdict for the defendant, He should have done this, it is alleged, on the ground that the facts showed that the defendant had committed a felony. At the trial Mr Torr, properly, would not have admitted that the defendant had committed a felony. He comes here applying on facts which, he says, shew a felony, and denies that a felony was committed. He applies on facts of which he denies the truth. He has, therefore, no *locus standi*. The only ground on which he could apply would be that he had committed a felony.

Blackburn, J.—I am of the same opinion. There are, no doubt, many dicta of high authority that where there is a civil injury which is also the subject of a criminal prosecution for felony, it is the duty of the person injured first to prosecute, and that he cannot go on with his civil remedy until he has prosecuted There is no case, however, before those of *Gimson* v. *Woodfull* (2 C. & P. 41), and *White* v. *Spettigue* (13 M. & W. 603), in which that rule has been acted upon. It is quite possible that such a duty may lie upon the party injured Upon a proper case made on behalf of the Attorney-General, acting in the capacity of public prosecutor, showing that such an action was brought by a person desiring to avoid prosecuting, or in any way to compromise a felony, the court might stay proceedings in the action. I doubt whether, upon the application of a defendant who was being criminally proceeded against, such an action might not be stayed until the criminal proceedings were disposed of, on the ground of his being harassed with the two proceedings at the same time. Now, it is said that it was the judge's duty to nonsuit the plaintiff, or to direct a verdict for the defendant. At the trial the question to be decided was: Did the defendant convert the goods mentioned in the declaration to his own use? If the jury had found that the facts had amounted to a felony, were the jury to say that the defendant was not guilty of the conversion? I do not think that the defendant could have pleaded a good plea that the conversion charged against him in the declaration was a felony. The authority for the series of dicta which have been quoted is to be traced back to the case of *Markham* v *Cobb* (Wm. Jones 147), decided in the time of Charles I. This was an action of trespass for entering the plaintiff's house and taking £3000 of his money. The plea was, that the plaintiff procured the defendant to be indicted and convicted before the justices of gaol delivery of the county of Nottingham for burglariously entering the said house and taking therefrom £3000, which was the trespass alleged. To this plea the plaintiff demurred The plea in effect was, that the plaintiff had elected to take criminal proceedings against the defendant, and therefore could not go on with this civil action. The decision in that case as to the election was that a party had an election between bringing trespass or an appeal; that bringing an appeal would be a bar to bringing an action for the

trespass; but that a conviction upon an indictment, which was the suit of the king, was no bar to an action. Then there is the case of *Higgins* v. *Butcher* (Yelv. 89). This was an action brought by the plaintiff for assaulting his wife, whereby she died. It was objected that this was a personal action, which died with the wife. Tanfield, J. says: "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost." After that comes the case of *Dawkes* v. *Coveneigh* (Styles, 346). This was an action of trespass and carrying away £250. The plea was not guilty. A special verdict was found to the effect that the defendant did feloniously break the house and carry away the £250 and was indicted for it, and was found guilty and burnt in the hand for it. The question was whether, under these circumstances, an action for trespass was maintainable by the party injured. There was at first a difference of opinion amongst the judges, but upon re-argument the whole court agreed with Roll, C.J., who said: "This is after a conviction, and so there is no fear that the felon shall not be tried; but if it were before conviction, the action would not lie, for the danger the felon might not be tried. And there is no inconvenience if the action do lie, and since he could not have had his remedy before, he shall not now lose it; and now there is no danger of compounding for the wrong." Judgment was accordingly given for the plaintiff. It may be added that the decision in the case of *Higgins* v. *Butcher* was on the ground that *actio personalis moritur cum persona*. From the time of the case of *Dawkes* v. *Coveneigh* there was no attempt made to interfere with actions on this ground until the case of *Gimson* v. *Woodfull*. The dicta had been repeated in the books, and the law had been so laid down. In that case Best, C.J., acted upon it, and made it a ground for nonsuiting the plaintiff. That case, however, was overruled by *White* v. *Spettigue* (13 M & W. 603.) Then we come to the case of *Wellock* v. *Constantine* (2 H. & C. 146) In that case there was no issue of felony to be tried by the jury. The plaintiff, on the face of the declaration, alleged that a felony had been committed. That, probably, would have been a case for the summary jurisdiction of the court in staying the action. No such course, however, was taken. The case went down to trial, and my brother Willes nonsuited the plaintiff. The court did not set aside that nonsuit. Throughout the argument, the dicta of the judges seemed to be that the judge was wrong in nonsuiting, and that what he should have done was to stay the proceedings. The court then suggested a *stet processus*; but the parties not being able to agree, the court thought it right to discharge the rule. They might have set aside the nonsuit, on the terms th t all proceedings in the action should be stayed until the question of felony had been settled. I do not understand the decision. I think that it would be a mistake in applying the rule to call upon the jury to try a question of felony which was not before them.

Lush, J.—I am of the same opinion. The party injured should, in the first instance, prosecute, and until he does so, cannot obtain redress. That is the rule; but how it is to be enforced we are nowhere informed. No instance has been mentioned to us in which the civil proceeding has been stayed. The defendant cannot set up his own criminality. The judge at Nisi Prius cannot interfere in the middle of the trial of the cause. He cannot refuse to try the cause. He cannot stay it. He cannot nonsuit the plaintiff, if there be evidence to go to the jury in support of his case upon the issues joined. He cannot direct a verdict contrary to the evidence. If the declaration on the face disclose a felony, that would be a ground for demurrer, or for a motion in arrest of judgment.

Quain, J.—I am of the same opinion. This is an application for a new trial on the ground of misdirection; that the judge should have directed a nonsuit or a verdict for the defendant on the ground that he had been guilty of a felony. The defendant did not say a word at the trial about a felony. He took his chance of a verdict. Now he says that a felony was committed. This is a position inconsistent with that which he took at the trial. He has no right to come here under these circumstance. Is there any case where such a course has been adopted, or where such a plea has been pleaded? There is none where such an application has been made by the felon himself. We cannot make such a precedent. If it appeared upon the face of the declaration, then it might be a case for demurrer, or for a motion in arrest of judgment.

Rule discharged with costs.

REVIEWS.

A Treatise on the Law of Damages: Comprising the measure, the mode in which they are assessed and reviewed, the practice of granting New Trials, and the Law of Set-off. By John D. Mayne, of the Inner Temple, Esquire, Barrister-at-Law. The Second Edition, by Lumley Smith, of the Inner Temple, Esquire, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1872.

When the first edition of this work appeared in 1856, it was welcomed as an able and a much needed exposition of the Law of Damages. The only preceding work of the kind in England was the old and forgotten treatise of Sergeant Sayer. In the United States, Professor Sedgwicke had written a work on the Law of Damages that, so far as his coun-

try was concerned, supplied a want. Mr. Mayne undertook to do for England that which Professor Sedgwicke had done for the United States. And it is no disparagement of Professor Sedgwicke's labours to say that Mr. Mayne proved himself no mean rival. From the moment that Mayne's treatise appeared, it secured for itself a place in every good law library, and a companionship with Roscoe's Nisi Prius on almost every circuit. This was because the arrangement of the work was good, and the views of the author in general reliable. His selection and examination of English and American cases was all that could be desired in a work of the kind. Had he explored the Canadian field of forensic jurisprudence as well as the American, he would have enhanced the value of his work. But as it was, from incongruous and widely scattered materials he succeeded in elaborating a concise and readable treatise on a very interesting branch of law.

One of his great difficulties was to distinguish between the right to recover and the amount to be recovered. People of little reflection may be inclined to smile at the mention of such a difficulty; but, as pointed out by the author in his preface to the first edition, the right to sue often depends upon the existence of the very circumstances which determine the right to damages. For instance, where the wrong complained of affects the public generally, the particular loss sustained by the plaintiff is the fact which at once gives him a right of action, and guages the compensation he is to obtain. So in actions against executors, the possibility of obtaining any real satisfaction may depend entirely upon the form in which they are sued, whether in their representative or personal capacity. In many cases of torts, no measure of damages can be stated at all, and the only way of approximating to such a measure is by ascertaining what evidence could be adduced in support of the particular issues.

The author did much to overcome the difficulty we have mentioned. His inability to do so altogether, made some portions of his work resemble a treatise on the Law of Nisi Prius, rather than one exclusively appropriated to Damages. For this he apologizes in his preface to the first edition. But no apology was necessary. The fact that his work in some parts resembles a treatise on Nisi Prius Law is no objection to it. On the contrary, the whole subject of Damages is one so essential for consideration at Nisi Prius, that a work on the subject is a necessary *vade mecum* to a Nisi Prius counsel.

There was a portion of the work more open to objection, and of little use to a Nisi Prius practitioner, viz., that which collected compensation cases. This class of cases is *sui generis*. Of late it has grown to such dimensions as to demand treatises relating almost exclusively to railway and other companies having compensation clauses in their acts of incorporation. In this connection we more immediately refer to the law of railway companies by Messrs. Godefroi and Short. The editor of the edition of the work now before us has, we think prudently, omitted this class of cases. He has, however, in all other respects, retained the original work in its original form. His additions, which are bulky, are placed within brackets, so as to distinguish his work from that of Mr. Mayne. Notwithstanding his efforts to compress, the second edition of the work contains one hundred pages more than the first edition.

A new edition of Mayne on Damages has been long needed. Often have we wondered that a second edition was not sooner issued. Of late years the decisions on the question of damages have been numerous and interesting. The accumulation of decisions during the sixteen years that have elapsed between the first and second editions have been so great as to increase the size of the work one-fifth beyond its original dimensions.

Mr. Lumley Smith, the editor of the second edition, has been very modest in attempting to proclaim what he has done. He does not even give us the number of additional cases included in the work, but these cannot fall short of a thousand. The original work contained references to about two thousand cases. This edition has no less than three thousand cases. The reading of these cases so as to understand them, and the placing of them when understood in the appropriate parts of the work, was a task of great labour and heavy responsibility. The editor has also, we should mention, made a selection of American cases since 1856. In a future edition we hope there will be some references to the decisions in this part of the British Empire. Of late we have had occasion to point out the omis-

sions in this respect of more than one English author. We shall continue to do so as long as necessary, but hope that before the lapse of much time English authors who extend their explorations to the legal fields of our American cousins will be induced to "cross the line," and make use of some of the fruit which we have in such abundance for their use, and which we can assure them is worthy of their acceptance.

We do not intend here to give a summary of the contents of the book. The original work is so well known as to render this unnecessary. But we may say that the second is printed in larger type and on better paper than the first edition. This perhaps may be explained by reason of the change of law publishers. The present publishers (Messrs. Stevens & Haynes) are taking the lead of older houses in London in the law-publishing business. They deserve to do so. Their enterprise and business ability merit great praise, and, better still, substantial patronage.

The Law Magazine and Review. April, July and August, 1872. No. III., New Series. London: Butterworths.

This is now a "monthly journal of jurisprudence for both branches of the legal profession at home and abroad." From the three numbers of the new series which have reached us, we should say that this valuable review will not lose caste by the change from a quarterly to a monthly; it will be even more acceptable in that it will be more frequent. The August number concludes "Notes on the Temple Church." We make room for that part of it which speaks of the Master of the Temple:—

"The master of the Temple has always held a position of honour. The greatest name in the list is undoubtedly that of the "judicious Hooker." In the Life of Richard Hooker, prefixed to the edition of his works, in 1666, it is mentioned that, in 1585, a Mr. Aloy, master of the Temple, died—a man so well loved, says the biographer, that he went by the name of Father Aloy. His predecessor, and the only one since the Reform, had been Mr. Ermstead. Hooker succeeded him, being selected thereto on account of his saint like life. He was then thirty-four years old.* He at once entered into controversy with the lecturer, a Mr. Walter Travers. The latter was a friend of Cartwright, and one of the great leaders of the Presbyterian school, which had given forth Martin Mar-prelate, and other books and pamphlets, which were disturbing the peace of Elizabeth and the Anglican party. It is said that Travers had hoped to be appointed master of the Temple, and to put his Presbyterian views of church government into practice. He was a man of blameless life, and, even according to his enemies, of great learning. His great offence was that he had taken orders at Antwerp. He kept up a correspondence with Beza at Geneva, and with others of his way of thinking in Scotland. Hooker and Travers seem to have preached in opposition to each other. They followed, says the biographers of Hooker, the apostolic example; for as Paul withstood Peter to the face, so did Hooker withstand Travers. 'The forenoon sermon spake Canterbury; and the afternoons, Geneva.' This was clearly dangerous, and the Archbishop of Canterbury prohibited Travers from preaching. Travers petitioned the Queen in Council. The latter refused to interfere. Whereupon the petition was published, and Hooker had to reply to it. The two great points in dispute show how entirely the 'great vital truths' of one generation are apt to be looked on as mere curiosities by succeeding ones. We dig them from the great sepulchre of dead and buried controversies merely to suggest a moral. They were, first, that Hooker had declared 'That the assurance of what we believe by the Word of God is not to us so certain as that which we perceive by sense;' and secondly, that he had ventured on the monstrous assertion, 'That he doubted not but that God was merciful to save many of our forefathers living heretofore in Popish superstitions, forasmuch as they sinned ignorantly'—a horrible piece of latitudinarianism which in these days would pass unchallenged. Hooker was gentle enough as well as 'judicious,' but he could hit out very neatly. Take this, for example, 'Your next argument consists of railing and of reasons; to your railing I say nothing; to your reasons, I say what follows.' The controversy divided the lawyers into two parties: the younger going mostly with Travers. The life in the Temple was too busy for the gentle Hooker and, in 1591, he petitioned to be removed, and had another living presented to him. His 'Ecclesiastical Polity' was written whilst living in the Temple, and was the result of the controversy just mentioned. Hooker's marriage hardly seems to justify the adjective 'judicious,' which usually accompanies his name. Recovering from an illness, he came to the conclusion that it was well he should marry. Instead, however, of looking out for a wife, he commissioned his landlady

* Life of Hooker: Hooker's Works, p. 9, edition, folio, 1666.

to do this duty for him. She made a selection, and her own daughter became the wife of Hooker. The marriage was about as unsatisfactory as might have been expected. Hooker's peculiarly gentle character, his simplicity, disinterestedness and utter unworldliness, combined with his attainments and ability, his sweetness and light, made him a favourite; and within a few years of his death caused his name to be held in a veneration more resembling that of a saint than that of any other modern English divine. Hooker was succeeded by a Dr. Balgey.

Sherlock's name ranks next in the list of those who have held the mastership of the Temple. He was in many respects a model and a typical Anglican clergyman. Living in violent times, he refused on the one hand to become a violent man, and on the other to abstain from taking part in the great controversies which were occupying men's minds. His first noteworthy appearance was when, towards the end of the reign of Charles II., an order-in-council was issued forbidding the clergy to touch on controverted points of theology. What this meant was, of course, that though they might preach the doctrines of the Church of Rome to their hearts' content, they must not venture to attack these doctrines. Sherlock refused compliance, and became unpopular at court in consequence. In 1688, when James II. issued his Declaration of Indulgence, and ordered it to be read in all churches, the leading clergy of London met together to consider whether or not they should comply with the royal command. Sherlock was among them, and was one of those who determined not to comply. A little later he was present at a still more important meeting, convened at the Palace of Lambeth. The famous seven Bishops were there, together with Sherlock and others of the leading city clergy. The petition, as our readers know, was signed only by the bishops, but doubtless they represented the views of Sherlock and his companions. It is sufficient to mention that Stillingfleet, Tillotson, Tenison and Patrick were there as well as Sherlock, to show that the non-episcopal part of the meeting had an amount of capacity among them fully equal to that found in the bishops. When the Prince of Orange and Mary accepted the sovereignty, Sherlock's old instincts as a clergyman, who had doubtless preached in favour of divine right of kings, was too strong for him. When we remember the wonderful declarations to which the clergy of that day had subscribed—as, for example, that they believed that it was unlawful in any case to take up arms against the king—the wonder is, not that a man here and there should be found like Sherlock, with a conscience unable to transfer his allegiance from a king who had in fact been deposed by arms, to one who, in accordance with the views all but universally taught by the clergy, was a usurper who had laid his hands on the Lord's anointed, but that so few among the clergy should have been found to be constant to their old professions. Sherlock refused to acknowledge William III., and became one of the non-jurors. Thenceforward, for a time at least, he was the great favourite of the Jacobite party. Subsequently he saw his way to taking the oaths."

Canadian Monthly and National Review. Toronto: Adam Stevenson and Co., Publishers. August and September, 1872.

The editors, we notice, are departing from the plan of giving the names of contributors to the articles in every case. We think it was a mistake so doing, and are glad to see the change. We commend to all lovers of the early history of England an inimitable sketch of King Alfred and his Times—especially in connection with University College, Oxford—under the title of *Alfredus Rex Fundator* written by Mr. Goldwin Smith. The sketch of Lord Elgin will be read with much interest by the admirers of that most estimable and useful man.

A Chinaman was sworn in New York recently according to his native custom. An interpreter and a queen's ware plate were procured; the interpreter repeated the oath and the "Heathen Chinee" waved the plate twice in the air and brought it down with a tremendous crash upon the table, after which he proceeded to give his testimony. Our courts are exceedingly compliant to the religious eccentricities of witnesses, and all that is essential to the validity of an oath is the belief in a Supreme Being, who will punish perjury; the form is left to the religious notions and court customs of the witness. Now we suppose if a Mahommedan should be sworn in New York, he would be furnished with the koran; and if a Hindoo should be called upon to testify, his demand for the vedas would be gratified; or if, like the Quaker, he should object to swearing by his bible, he would be allowed to swear according to his native custom.—*Albany Law Journal.*

The Paris *Figaro* says that the argument for the defence in the late Irish murder trial was borrowed from a French lawyer, M. Chaix d'Est Ange, who, in behalf an assassin, urged the following plea: "Suppose that the unfortunate victim had been struck with apoplexy between the moment when his assailant lifted his axe and that at which the axe fell upon him, in such case you will have condemned an innocent man."

DIARY FOR NOVEMBER.

1. Fri.... *All Saints' Day.*
2. Sat.... Last day for Articles, &c., to be left with Secretary of Law Society.
3. SUN.. *23rd Sunday after Trinity.*
10. SUN.. *24th Sunday after Trinity.*
14. Thurs. Examination of Law Students for call with Honors.
15. Fri.... Examin. of Law Students for call to the Bar.
16. Sat.... Examination of Articled Clerks for certificates of fitness.
17. SUN.. *25th Sunday after Trinity.*
18. Mon... Michaelmas Term begins.
21. Thurs.. Inter-examination of Law Students and Articled Clerks.
22. Fri..... Paper Day, Q.B. New Trial Day.
23. Sat.... Paper Day, C.P. New Trial Day, Q.B.
24. SUN.. *26th Sunday after Trinity.*
25. Mon... Paper Day, Q.B. New Trial Day, C.P.
26. Tues.. Paper Day, C.P. New Trial Day, Q.B.
27. Wed... Paper Day. Q.B. New Trial Day, C.P. Last day for setting down and giving notice of re-hearing in Chancery.
28. Thurs.. Paper Day, C.P. Open Day, Q.B.
29. Fri. ... New Trial Day, Q.B. Open Day, C.P.
30. Sat. ... *St. Andrew.* Open Day.

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THE

Canada Law Journal.

NOVEMBER, 1872.

The well-worn maxim, "*De minimis non curat lex*," is all very well in its way; but there are some small things which lawyers must take care of, and as to which the counter-maxim applies, "*Peccare in minimis maximum est peccatum.*" One small thing which has troubled us is the persistent way in which the printers of our Statutes and reports will truncate the proper abbreviation of Her Majesty's first Christian name. It may be in keeping for some of our very good friends of the adjoining republic to talk and write of "*Vic.*," because they cannot pronounce "*Vict.*;" but surely the latter is the correct mode of printing the reference to statutes passed in the present reign. "Vict." is the root or etymon of "Victoria," and, as such, forms its proper syllabic division, and should be regarded in abbreviating the name. In all English law books the citation of statutes passed in Her Majesty's reign is as we contend for.—Another small matter we may mention, though of less consequence: Is not the citation of the Queen's Bench Reports for this Province, as to the volumes subsequent to the statute of Ontario, 34 Vict. c. 8, by the initials "U. C. R.," incorrect? Yet we find in the reports references to cases indicated in this way. This statute, at all events, changed the name of the Court, if it did not in terms the title of the Chief Justice. The name of the Court is now "Her Majesty's Court of Queen's Bench for Ontario." It would be perhaps inconvenient to alter the number of the volume, and commence a new series of "Ontario Reports." It has been suggested that the series may be abbreviated and cited thus: "31 Q. B. (Ont.)." If any one has a better suggestion to offer, let the public get the benefit of it: we shall be glad to give him space.

The question as to what is waste by tenant for life in this country, where the land in question is uncleared, still remains undecided. The case of *Drake* v. *Wigle* in the Common Pleas last Easter Term came near it, but the

Court considered that the question was not brought up in such a way that they could properly discuss it. It was, however, discussed by the counsel in the case, and the court remarked:

"We have looked into the authorities, English and American, on the main question, together with the remarks made from time to time by our own Law and Equity Judges, and are prepared to express our opinion whenever the question is fairly presented to us."

Under these circumstances it may perhaps be a matter of regret that no opinion was expressed.

On the opening of the Court of Queen's Bench in Manitoba on a recent occasion, the Chief Justice of Manitoba, the Hon. Alexander Morris, delivered the following excellent charge to the grand jury:—

"Gentlemen:—It is my duty, and, I may say, my privilege, now to open the first term of the Court of Queen's Bench for the Province of Manitoba. The occasion is an interesting and important one. In years to come it will be looked back upon as one of the landmarks in the history of the rise and progress not alone of this Province, but of the North-west, to which it is the portal. The establishment of social institutions, the laying the foundation of law and order, are always eras in the history of a new country; and respect for the laws, and due and orderly regard for the requirements of the civil power, are prominent characteristics of the races who are under the British supremacy. Such respect I look for in Manitoba, and in discharging the functions I am called to exercise, it shall be my anxious desire to know neither race, creed nor party, but to administer the laws without fear, favour, or partiality; and, so acting, I am confident that the Court will be supported by the community. Every man who has a stake in the country, has a direct interest in the impartial administration of the law, and all such will rejoice that a Court, fully equipped, will henceforth interpret those Common, Dominion and Provincial Laws, which regulate and control all the relations of social life. There is, beyond question, and I am enabled to speak from an extended observation of various sections of Manitoba, a brilliant future before British North-western America. As an agricultural country, it must take the highest rank. But, to secure that rapid development which its advantages entitle it to, and to attract that great influx of population which its natural resources fit it for, there must be stability in the institutions of the country, and there must be confidence that British law and justice will be found in full and entire force. To aid in giving that assurance will be my duty, and I have all confidence that the people of this Province, of all classes, will rejoice that the Court of Queen's Bench is now in full operation. And here, before passing to other subjects, I would remark incidentally, that I look to the Bar of Manitoba for their aid in the discharge of my duties. The *esprit de corps*, inseparable from over twenty-one years at the Bar, will naturally lead me to respect and uphold the privileges of the Bar, though I will be ready, at all times, while treating the Bar with all courtesy, to uphold the dignity of the Bench; and I therefore look for the most kind relations as likely to prevail between the Bench and the Bar."

After alluding to the recent disturbances there, when certain printing offices were attacked by a mob, and much property destroyed, he continued:—

"If Manitoba is to be prosperous, there must be peace and order, there must be confidence in the administration of the laws, and there must be a fearless execution of these laws against all offenders, be they whom they may. I trust that, henceforth, British subjects in this Province will remember that free men are freest when they yield a ready obedience to the law; and that men of all classes in the land will resolve to work out the destiny of the Province, by the use of the free institutions of the country, without resort to acts of violence, which only bring disgrace on those who commit them, and discredit on the fair fame of the British Empire."

On the occasion of their late visit to Toronto, His Excellency the Governor-General and the Countess of Dufferin paid a visit to Osgoode Hall. After due inspection of the building, the Courts and the Library, they were entertained at luncheon by the Benchers; the reception was quite private. This reminds us that we have received from Messrs. Notman & Fraser, photographers of this city, two likenesses of Lord Dufferin. We presume we are indebted for the compliment to a very proper concatenation of ideas, running somewhat in the following train, thus: The Queen's representative—the Queen herself—the Fountain of Justice—Courts of Law—Lawyers, and so to the *Law Journal*. However this may be, the photographs are gems in the way of art, as well as perfect likenesses of the Governor-General, who in his gracious manner and lavish hospitality is the best repre-

sentative of our Gracious Queen that has ever honoured our *alma mater* with his presence.

The following effusion is too good to be lost. It must have struck the recipient with profound awe, not to say terror. Whether it had the desired effect we know not, but are informed that this effort of the worthy J. P. was too much for him, for the gentleman who sent us the document quaintly remarks, "You will not be surprised to learn that he has since died." The paper reads as follows, except that we disguise the names:—

"Province of Canada,
"Counties of Huron and Bruce,
"To wit:
} Thomas W. Smith, of the Township of

McKillop maketh oath before the undersigned one of Her Majesty's Justices of the Peace in and for the said Counties for that Mr. Brown also of McKillop unlawfully holds two ewes the property of said Complant I advise you on receipt of this note to return said sheep to Thomas W. Smith save costs & verry much oblige

"Respectfully yours,
"Peter Smith J.P. (Seal.)"

We would suggest that Mr. Anderson should be instructed by the Benchers to ask students at next interim examination to define the nature of, and give the technical name to the above document.

The judges of the American Republic are manifestly girding up their loins against municipal and magisterial corruption. Finletter, J. in the Court of Quarter Sessions of Philadelphia, upon a prosecution for taking extortionate fees by a Justice of the Peace, commences his judgment after this fashion: "Complaints of the rapacity of the local magistracy have come down to us continuously from the earliest periods. Its history is written in the statutes which were vainly intended to punish and suppress it. Its portraiture is found in the current literature of the times. 'Shallow' and 'Dogberry' and the justices of Fielding, himself a magistrate, are photographs of living actors of the past and present. The common law abhorred it; and its condemnation is dotted all along the highway of judicial decision in indignant language."

One of the most astounding pieces of judicial statistics which we have recently come across reaches us from the State of Illinois. It appears that the Supreme Court of that State has determined one hundred and thirty-eight appeals from inferior courts, and that the judgments in the eight have been upheld, and those in the one hundred and thirty reversed. Here, surely, is an intolerable amount of sack to a penny-worth of bread. We fancy suitors must be in a happy and contented frame of mind, when they ascertain that the court below has gone against them. Indeed, it seems to us that the judges below had better decide the cases by "skying a copper," because then, as somebody has remarked, "*Heads* might have something to do with the matter;" and, we might add, many a scandalous *tail* be saved.

LAW SOCIETY, MICHAELMAS TERM.

CALLS TO THE BAR.

Of the eighty-three Students who gave notice of call, only thirty-three presented themselves for examination. Those who passed without an oral examination are given in order of merit, the rest are not.

The following gentlemen were called to the Bar; seven having been rejected:

C. H. Ritchie, Toronto; R. M. Fleming, Toronto; A. F. McIntyre, Cornwall; J. A. Paterson, Toronto; J. Fletcher, Brampton, (without oral examination). J. B. Smith, Lindsay; H. J. Macdonald, Ottawa; T. Langton, Toronto; R. Sedgwick, Halifax; W. R. Mulock, Toronto; J. Akers, Toronto; C. Gorbould, Picton; N. W. Hoyles, Toronto; W. Roaf, Hamilton; G. Dormer, Lindsay; J. A. Barron, Lindsay; J. White, Hamilton; J. A. Gemmell, Ottawa; F. W. Monro, Toronto; R. L. Roblin, Picton; G. McNab, London; M. Malone, Toronto; J. Rome, Berlin; B. W. Vidal, Sarnia; J. R. Strathy, Toronto.

R. J. Wicksteed, Esq., of the Quebec Bar, Ottawa, was also called to the bar of Ontario.

The following Attorneys were admitted. The names are given in order of merit:

G. Luton, Toronto; C. H. Ritchie, Toronto; T. Langton, Toronto; H. J. Macdonald, Ottawa; W. F. Ellis, Chatham; G. A. Watson, Goderich; J. A. Paterson, Toronto; A. F. McIntyre, Cornwall; W. R. Mulock, Toronto; J. R. Strathy, Toronto, (without oral examination). S. Wallbridge, Toronto; R. H. Bowes, Toronto; R. B. Carman, Belleville; J. F. Bell, Toronto.

RESIGNATION OF VICE-CHANCELLOR MOWAT.

Our readers cannot but be aware that the senior Vice-Chancellor has resigned his seat on the Bench to take the position of Attorney-General for Ontario, in the place of Hon. Adam Crooks, and to become Premier of the Government of Ontario, instead of Hon. Edward Blake.

The "decline and fall" of the Hon. Oliver Mowat is an episode in the nature of history-making, that would form sufficient subject-matter for a Canadian Gibbon to produce a book of no small interest or importance. We do not propose, however, to encroach on the general ground; nor on grounds better adapted for discussion in a political paper, but simply to notice the aspects which the facts present from the stand-points of the judiciary and the profession.

Whatever view the outside world may take of the matter, it will not prevent strong expressions of opinion from astonished lawyers and more guarded utterances from surprised judges, at the untoward event which at once has lost to the Court a learned brother, and found for the profession a co-labourer in the common ranks. A rude shock has been given to the stability of the judicial position, which the judge himself ought to have been the last to have occasioned. It is not the fact simply that a judge has for good cause, or for no assigned cause, retired, directly and promptly, from the bench, as that he might have done, and as has been done before with dignity and honour, both maintained and perpetuated; the trouble is that a descent like this is not a retirement, nor even an abandonment; but has the appearance of a fall, by reason of an improper pressure that should not have been tolerated by the custodian of an office so sacred and so important. The decline is what gives impetus and force to the fall. The lever that gave to the bench the descending inclination is one of the objectionable features in the movement, and the facts point too pointedly to an inclination in the direction of the fall not to believe in its existence. We do not say that a judge is bound to continue on the Bench at the sacrifice of his health, or of an increased income, (though this has been done time and oft by judges jealous of the traditions of their order); but there is a glaring impropriety in this step, and in the precedent negotiations, which cannot but strike the most superficial observer; though, strange enough, it seems to have escaped the attention of the late learned Vice-Chancellor himself. For his own sake, we regret that it did so.

Individuals may or may not believe that a judge who leaves the bench for politics, at the request of the leader of a party with which he was formerly allied, has all along been an ardent politician. This, however, in itself, is no real grievance, so long as it does not interfere with, or in any way affect the judicial mind, as, for example, in the case of the Lord Chancellor in England; and, as far as Mr. Mowat is concerned, there has never been the slightest evidence of a tendency to fear, favor or affection. But whilst we are prepared to assert, and do assert this, as well of him as of all our judges, it is nevertheless a fact that the great mass of the people will certainly begin to attribute improper motives to judgments, which to the profession may be most unassailable, and will look upon judges as politicians in disguise, when a judge leaves the Bench directly and avowedly to go into politics, without any interval even to "give colour" to the change. What will be the confidence of the public in the trial of election petitions by judges, if the very judge who one day tries the case and unseats a sitting member, is the next day found leading a government to which the respondent was violently opposed. Better repeal that which was till now a most wise and proper enactment, and let the right to the seat be fought out by partisan committee men.

This view of the matter, if entertained generally, would introduce into the forum a bone of contention in addition to the "pound of flesh" usually in dispute by litigating Shylocks. Counsel would not only be bound to prepare himself for, and apply himself to the conviction of the mind judicial, but also to the mind political of the court. Those judges whose zeal for politics blinded their judicial discernment, would give greater attention to the political charlatan than to the counsel learned in the law. Desperate efforts would be made by suitors of a recognized political stripe to get their cases before the judge tinged with the hue of their party. In such cases political proclivities would lead to the selection of counsel adapted to the ear of the supposed partisan judge. In this way the worst features of political corruption would be

transplanted from the lobby to the corridor; from the halls of legislation to the halls of justice. One of the objectionable characteristics of the American judicial system, as distinguished from the English, has in this instance been given the weight of a name heretofore regarded as eminently honorable and upright, both from a personal and judicial point of view. This every lover of his country will lament.

Respect for the law is intimately associated with respect for the law-giver or law-administrator. If law is administered by undignified persons, or by those suspected of partisan feelings, the popular mind at least will be prone to regard the law itself as unworthy and partial, and it will fall into general contempt. Loss of respect for the Bench at once weakens the whole framework of society, and woe betide any country whose judges have been subjected to even the breath of suspicion.

This frailty or weakness, it is to be feared, may be thought by the intensely interested public to be general or epidemical. It is deeply to be regretted—very much to be deplored, that the foundations of judicial power have been weakened by the weakness of a weak brother. The remaining pillars of justice will have to be strengthened by some legislative or administrative application, that will prevent political barnacles from wasting away their firmness and stability.

The profession has been wont to admire the Bench as a place of permanent honor and practical usefulness. It will now be subject to the reproach of fickleness and temporizing utility. Many will look upon it as an elevated vantage-ground from which to scan the contending elements of faction, and from which the occupants are prepared to step down into the arena of conflict, when the prospects of extended patronage, or the gratification of a taste vitiated by the expectation of enlarged emoluments are in view.

The profound respect and traditional deference paid to the Court by the Profession would be perceptibly diminished in proportion to the probability that the judge might one day be "your lordship," and the next, "my learned friend;" one day an authority whose oracular dicta would be sustained by the whole civil and military forces of the Empire, and the next day a speaker whose utterances and arguments would be tattered and torn into shreds of illogical incoherencies by his opponents.

The profession, as such, has a special duty to perform between the Bench and the people, than which there is nothing more important for the due and impartial administration of the law. This duty is to maintain and promote before the public a becoming respect for the Court. This educates the popular mind as much or more than anything else. Where this is wanting, regard for the authority of the Court is wanting; and when once that is gone, the strongest element in obedience is destroyed, and insubordination and anarchy are necessary consequences.

We cannot but most seriously regret the resignation of Mr. Mowat, and his immediate acceptance of the position of a political party leader, and the undoubted necessity of accepting the position of practising at the Bar with those whom he formerly presided over as a judge.

We trust this experiment will not be repeated; that the present daring contempt of judicial traditions and judicious rules will not be accepted, or acted upon, as a precedent hereafter. We hope that the public opinion educed, and the professional reprobation almost universally manifested at the act, will for the future prevent political intrigues from culminating in judicial declensions. We know of no precedent to fit this case, though possibly one might be found in the United States, but Heaven forbid that we should seek for one there; any analogy from miscalled precedents in England is against such a step. These may perhaps be considered in a future number.

LAW REFORM.*

It is almost impossible to take up any journal, whether lay or legal, without finding somewhere in it a reference to the topic which we have placed at the head of this article. The alterations which have taken

* We have much pleasure in inserting this article, from the pen of a valued occasional contributor. He expresses his views clearly and well; but whilst we admit this, we cannot say that he has convinced us that the practice in Chancery should prevail, in case of a fusion, over that at Law. We are not yet prepared to believe that the Common Law Procedure Act is inferior to the ever changing orders of the Court of Chancery, as a basis of procedure. And without going into a further discussion at present, it is an item for consideration that the practice under the C. L. P. Act is more familiar with the profession at large than the other, and could, as is believed by many good judges, more easily be adapted to the future requirements of the country, than the practice of equity; but we will not spoil a good cause by a brief notice of only a few of the arguments which may be adduced in favor of the opinion which seems to us the soundest.—Eds. C. L. J.

place in English law within the last few years have been neither few nor small, yet they seem to be but shadows of coming changes of far wider scope and consequence. Unquestionably, there is in the legal circles of the mother country a strong tendency towards the codification of the laws; we think it needs no great wisdom to predict that this will be a result, the accomplishment of which is no more than a question of time. Probably before this consummation is reached, there will be many intermediate changes and modifications of the existing system, such, for instance, as are foreshadowed in Sir John Coleridge's address at the Social Science Congress. By these the various branches of the law in the matter of evidence, of commercial law, of real property law, and the like, will be systematized by way of codification. By process of complete codification the principles of law will be more or less changed: matters doubtful will be reduced to certainty; harsh rules will be mollified by direct enactment; consistency and logical development will supersede the disjointed and anomalous conglomeration of case-made law.

But in the immediate future, perhaps, there is no more pressing question than that of uniformity of curial procedure, and, coupled with this, the re-adjustment of the jurisdiction of the courts, so that any person who has a valid cause of action, whether legal or equitable, or both, may obtain an adjudication of his case upon the merits, without being driven from one court to another, on technical objections to the jurisdiction.

In this Province there has been a gradual assimilation of the practice in the courts of law and equity. This is especially noticeable in the mode of trying causes by the Court of Chancery under the circuit system, where the evidence is given *viva voce* in open court, the case argued at once and disposed of by the judge, just as in Nisi Prius cases, where a jury is not asked for. So in the establishment of local offices to facilitate the transaction of equity work, the Court of Chancery in Ontario has departed widely from English precedent, though it has acted in conformity with the common law mode of distributing business. As regards the jurisdiction of the courts: when one looks at the Common Law Procedure Act, and observes in how many points the systems of law and equity touch, and when one looks at the reports, and observes in how many cases litigants have been prejudiced because courts of law and equity have not had co-ordinate jurisdiction,—one cannot but wish that some scheme were devised whereby the vexatious lines of demarcation might disappear and (in the language of a well-known pleader, who now adorns the bench of one of the common law courts) "the course of justice flow unobstructed."

The conditions for the successful consummation of such a plan are more favourable in Ontario than in England. Besides the present similarity of procedure, to which we have adverted, which does not obtain in the English courts, we have not the numerous, well-disciplined, and devoted Chancery and Common Law Bar, which in England is powerful enough to delay the adoption of changes, beneficial to the public, though conceived to be detrimental to the privileged few.

There are two modes whereby the injustice to suitors which we have indicated may be remedied. The first is to leave things as they now are in respect to jurisdiction and procedure, and to confer upon the superior courts, by statute, the power to transfer causes from one court to the other, so that a common law cause of action which has strayed into chancery may be relegated to its proper forum, and so that an equity which could not be worked out at law by reason of the insufficient machinery of the court, may be passed over to a competent tribunal. This scheme, properly worked out, could, without doubt, be made an adequate provisional remedy, but it would be manifestly only a half-way stage to effectual relief. The ultimate goal of all such amendments can only be that to which the Attorney-General of England adverts in these words, "the fusion of our two systems of law and equity, a thing, in my opinion, which is absolutely certain one day to be done."

Now, in setting about any scheme of fusion there are a few principles to be borne in mind by law reformers in Canada. It is impossible to satisfy every person, or class of persons, affected by the changes. New, and perhaps unpleasant work will be thrown on the bench and on the bar. Solicitors and attorneys will be unable to agree which class is to swallow up the other. This will be, however, a matter of small concern to the great body to be benefitted,—the people—in whose eyes, according

to Jekyll's joke, there is as much difference between attorney and solicitor as there is between crocodile and alligator. Yet all classes will agree that one chief end to be sought is the *maximum* of general good with the *minimum* of change. This will necessitate a choice of one of the two, or between the two systems of procedure which obtain at present in common law and Chancery practice. Now, the simpler and more direct mode of procedure is the most suitable for modern times. For this reason, other things being equal, the writer would prefer, where the two modes of procedure are so inconsistent that they cannot be amalgamated, that the practice as settled by the general orders and decisions of the Court of Chancery, should prevail over the practice at law, which has been mainly imported from England, and the great triumph of which was to simplify considerably time-honoured complexities of the ancient practice. The equity judges have been astute to frame orders from time to time adapted to the wants of the country and the requirements of suitors. The consolidated orders as they stand embody the results of the experience and sagacity of many eminent judges, who were obliged from the position of the Court of Chancery to adapt its procedure to the special circumstances of this Province.

If the three superior courts were consolidated, with a common jurisdiction, and their official machinery enlarged, there would be work enough for them all to do. It is idle and ignorant talk that some of our daily newspapers indulge in, when they recommend the abolition of Chancery. Two sentences of Sir John Coleridge's admirable address put the matter in its true light. He says: "It must be remembered always that the things themselves, law and equity, and the rights and liabilities arising out of them are inherently distinct. The distinction is in the nature of things, and has not been created nor can be abolished by act of Parliament." Nor do we think that the changes need be so excessive or so alarming as some persons imagine. There can always be power given to the judges to *classify* and *apportion* the work which is brought before them, so that judges of equity training may be assigned to equity business, and judges of common law training and aptitude to common law and criminal causes. At all events, there is an ample field open for our legislators and law-officers. Any man or set of men who achieves success in this direction shall well merit the benediction of Coke,—"Blessed be the amending hand!"

WHO IS TO BE VICE-CHANCELLOR?

The usual greeting between lawyers since Mr. Mowat's resignation (of which we speak in another place) has been, "Who is to be the new Vice-Chancellor?" Various wild rumours are afloat, and it is abundantly evident that there is no one now at the bar likely to accept the office who is head and shoulders above his fellows. Some will have it that a learned judge on the Common Law bench will be asked to accept the office. He would be eminently fitted for it, but we can scarcely fancy him exchanging his present position for a more arduous one, and entailing a certain amount of labour in getting up the present practice of the court. By the way we can scarcely fancy the remaining very learned Vice-Chancellor would like to have a senior to himself translated to his court. The name of a learned Queen's Counsel in much favour in the west was also mentioned, but he is said to have modestly replied that he was as much fitted to be made an Archbishop as a Vice-Chancellor. The name of Mr. Proudfoot has also been mentioned; and when speaking of Hamilton, one could easily fancy an excellent appointment in the person of Mr. Burton. We have also heard allusions made in this connection to the appointment of a present member of the Dominion Cabinet, but whilst giving this gentleman credit for much ability we doubt his present fitness for the office; though it does not follow that he would not, after a comparatively short time by hard work, make himself competent. Mr. Blake would not of course accept the vacant seat, but possibly Mr. Crooks might, and if he would, his claims should not be overlooked. Mr. Thomas Moss might perhaps be induced to give up his lucrative practice, but we doubt if such a young and so rising a man would be content to be shelved just yet. If, however, he should feel constrained to accept it, the appointment would be as creditable to the Executive as it would be beneficial to the country. Mr. Maclennan, again, has many qualifications for the office, as have also several younger men at the Equity Bar. Such a sound real-property lawyer as Mr. Leith, though not at present

very familiar with the practice of the Court, would not be out of place on the Chancery Bench. Mr. D. B. Read had at one time a large Chancery business, and his appointment would not be unacceptable to many in the profession.

The fact is, there is a dearth of material at the equity bar, if we except those few eminent men who, perhaps, for political reasons, might not be offered the vacant seat, or who, if offered it, might refuse to accept an office which would entail greater labours and give less remuneration, than fall to their lot as counsel; to say nothing, we were almost going to say, of being shut out from politics and other objects of ambition, but this, alas, is now one of the traditions of the "good old times;" the action of the late Vice-Chancellor has taught us something new in this respect.

Whoever the recipient of this office may be, and it is no bed of roses, we hope (1) that the appointment may soon be made, (2) that it may *not* be made a matter of party politics, and (3) that the time is approaching when all our judges may receive salaries which will not be as they now are, both disgraceful to the country, and most injurious to its best interests.

VENTILATION.

Mr. Justice Wilson has spoken out well and boldly at the Hamilton assizes, in condemnation of the wretched ventilation of Canadian court-houses. It is well known that his name-sake, Mr. Justice John Wilson, was poisoned by the abominable atmosphere of the court-house at Owen Sound. The *Lancet* takes up the same theme with reference to the deeply-lamented death of Mr. Justice Willes. It says that his mental aberration was, in consequence of physical disease, intensified, if not incurred, by the bad ventilation of the law courts, in which he spent so much of his intellectual activity. The *Lancet* proceeds thus: "Dr. Angus Smith records a visit to a London court, which, at the moment of entering, was extremely warm and unpleasant, and after some minutes intolerable. He stayed long enough to collect specimens of the air, which he found, on analysis, to contain a smaller amount of oxygen than any place above ground, 'except the gallery of an extremely crowded theatre at half-past ten at night.' But he adds the court air was still worse than that of the theatre, its temperature being very high, and the organic matter from perspiration in proportion. A handkerchief which had wiped from one of the windows a little of the animal steam, by which they were dimmed, smelt offensive afterwards. Law reform is a large subject; but the improvement of the courts in which it is administered ought to find a place in its programme. We are afraid to think of the valuable lives which may be slowly yielding to influences like those so disastrous to Justice Willes—bad air breathed during mental strain of the severest kind. How long will it be before the judge on the bench is as well off in the matter of oxygen as the prisoner in the gaol?" No court-house in the Province requires reformation in this respect more than Osgoode Hall. The new benchers have shown themselves not remiss in attending to needed reforms. Let them now address themselves to this duty, and set an example in the metropolis which the county towns may well copy.

LEGISLATION IN NOVA SCOTIA.

Our attention has been drawn to two measures which it is proposed to bring before the Legislature in Nova Scotia, at its next session. One is an Act for establishing County Courts, and the other an Act to confer criminal jurisdiction on the County Courts. Their purport will be best seen from the synopsis given below, some of the clauses being copied in full:

AN ACT FOR ESTABLISHING COUNTY COURTS.

Be it enacted as follows:

1. There shall be established in each of the Counties of this Province, except the County of Halifax, a Court of Law and of Record, to be called the County Court of (the name of the county). The sittings shall be held at the Court House, &c.

2. [Names of Districts—Judges to hold office during good behaviour, &c.]

3. [Provision in case of inability of Judge to hold Court.]

4. No Judge of any such Court shall practice, carry on or conduct any business in the profession or practice of the law, while being such Judge, on pain of forfeiture of his office.

5. [Judge's oath of office.]

6. The practice, forms and modes of proceeding shall be according to the practice of the Supreme Court of this Province; and the Judges of such County Courts shall at all times be governed by the decisions of the Supreme Court.

7. The table of fees shall be the same as in such Supreme Court, for the like services.

8. The Courts shall not have cognizance of any action:—

1st. Where the title to land is brought in question,—or

2nd. In which the validity of any devise, bequest, or limitation is disputed, except as hereinafter provided, or

3rd. For criminal conversation or seduction, or

4th. For breach of promise of marriage, o

5th. Of any action against a Justice of the Peace, for anything done by him in the execution of his office.

9. Subject to the exceptions in the last preceding section, the County Courts shall have jurisdiction, and hold plea in all actions *ex contractu*, when the debt or damages claimed do not exceed the sum of two hundred dollars, and in all actions of tort, when the damages claimed do not exceed one hundred dollars, and in actions on bail bonds given to a Sheriff in any case in a County Court, whatever may be the penalty or amount sought to be recovered.

10. [Pleadings setting up title to land to be verified by affidavit.]

11. [Courts to hold four Terms in a year, and Judge may adjourn to a future day.]

12. [When and where Courts to be held.]

13. If the Judge shall be satisfied, by either party in a cause in his Court, that such cause can be more conveniently or fairly tried in some other County Court, he shall order that the venue be changed, and that the cause be sent for hearing to such other County Court; and the Clerk of the Court shall forthwith transmit by post, to the Clerk of the Court to which the cause is sent, all papers and proceedings in the cause on file in his office, and a certified copy of the order for changing the venue; and such cause shall be dealt with in such Court, as if originally brought therein.

14. [Direction of process to and execution by Sheriffs.]

15. The Evidence Act, and the law relating to the deposition before trial shall apply to the County Courts as far as applicable.

16. [Duties of Clerks, &c.]

17. No defendant shall remove any action commenced in the County Court, into the Supreme Court, by *Habeas Corpus*, or *Certiorari*; and, if any action be brought in the Supreme Court, that could have been brought in a County Court, or any action be brought in a County Court, that ought to have been brought in the Supreme Court, the plaintiff shall not be allowed any costs, unless the presiding Judge shall certify there was good cause for bringing the action in the Supreme Court or County Court, as the case may be. In case such cause shall be transferred to the Supreme Court or County Court, as the case may be, all further proceedings held therein shall be carried on as if such cause had been originally brought in the Supreme Court or County Court, as the case may be.

18. [General powers of Court and Judge defined, similar to those of our County Courts.]

19. [Appeal given to the Supreme Court.]

20. The County Courts shall have and exercise jurisdiction in all cases under the act for overholding, and under the absent or absconding debtor act, as the same is now exercised by the Supreme Court.

21. No privilege shall be allowed to any person to exempt him from the jurisdiction of the several County Courts; but members of the Legislature shall not be arrested or imprisoned by civil process issued out of any such Courts.

22. Judgment from the County Courts shall bind the lands of the defendants from the time of registry, as in the Supreme Court. Writs of execution shall be in the same form, and of like effect, as those out of Supreme Court.

23. [Writs and process to other Counties.]

24. [Juries same as Supreme Court.]

25. The Judge of any County Court may try and determine causes brought to issue before him without the intervention of a jury, if both parties agree thereto.

26. Appeals from the Magistrates' Courts shall be to County Courts, and shall be tried and determined by the Judge thereof, either summarily or by a jury; and there shall be no appeal from the decision of such judge or jury.

27. [As to pending suits.]

28. The summary jurisdiction of the Supreme Court, except in the County of Halifax, is abolished. Acts inconsistent herewith repealed.

29. The Judge of each County Court shall be, *ex officio*, a Justice of the Peace, in and for the district for which he is appointed; but shall not issue any civil process.

30. Only Attorneys of the Supreme Court may practice in the County Courts.

31. [Seal and books to be provided.]

32. [Fees to Clerk, &c.]

AN ACT ENTITLED AN ACT TO CONFER CRIMINAL JURISDICTION ON THE COUNTY COURTS.

1. The several County Courts in the Province, shall have exclusive jurisdiction of all misdemeanors committed within the body of the respective Counties, and original concurrent criminal juris-

diction within the respective Counties with the Supreme Court, of all crimes and offences, which are not capital, committed within their respective Counties, which crimes and offences shall be triable by whichever Court, the Supreme or County, shall first hold Court in the County, next after the committal of the party charged with such crime and offence, and the judges shall have full power and authority to hear, enquire into, try, determine, deal with and punish all such crimes, offences and misdemeanors aforesaid, in manner prescribed by law, provided always that the Attorney-General of the Province may, at any time and in any stage of the proceedings, relating to all crimes and offences, except misdemeanors proceeded under in any County Court, take charge of, and control such proceedings, as fully as if cognizance were being had in the Supreme Court of such crimes and offences, and may at any time, previous to the commencement of any trial, in any County Court for any crime and offence, cognizable in such Court, except misdemeanors, issue his fiat, and transmit the same to the Clerk of the County Court, where such crime or offence would be triable, which shall have the effect of determining the jurisdiction of said County Court as far as regards such crime and offence, and giving to the Supreme Court of the said County exclusive jurisdiction over such crime or offence. All acts, and part of acts, touching and concerning the criminal laws and the administration of criminal justice in the Province, or relating to jurors, witnesses, evidence or proceedings of any kind now in force, and applicable to the Supreme Court, when exercising criminal jurisdiction, shall be in force and apply to the several County Courts, except as herein modified or altered; and the County Courts shall be clothed with and exercise all the like powers, rights and privileges, in all cases cognizable by them as now appertain to, or are exercised by the Supreme Court, as Courts of criminal jurisdiction; provided that no grand jury shall be summoned to attend any County Court, except upon the order of the Judge of such court directed to the Sheriff for that purpose, who upon receiving such order shall immediately summon seven grand jurors to attend such court, who shall be sworn and charged and due presentment make of any matter submitted to them by the Judge of such court.

2. All warrants of committal issued by, and all examinations and recognizances taken by any justice of the peace, or relating to parties committed for trial for any offence or crimes which are not capital, shall be by him immediately after transmitted to the Clerk of the County Courts of the County within which such crimes and offences have been committed—if such court shall sit in said county—previous to the Supreme Court; and all warrants of commitment issued by, and all examinations and recognizances taken by any justice of the peace, or relating to persons committed for trial at any County Court, for misdemeanors, shall immediately thereafter be transmitted to the Clerk of such County Court.

3. The several Judges of the County Court may admit to bail any person charged with any offence (except capital offences) in the same manner and to the same extent as may be now done by a Judge of the Supreme Court.

4. In any and every case of summary or other conviction, before any justice or justices of the peace for any county, or the Stipendiary Magistrate for the city of Halifax, an appeal from such justice, or justices or Stipendiary Magistrate may be made to any Judge of the County Courts—which appeal the said justice or justices or Stipendiary Magistrate shall grant, on the party so committed giving bonds, with sureties, in such sum as the justice or justices or Stipendiary Magistrate shall deem proper, to appear and prosecute said appeal at the next sittings of the County Court in the county, and the Judge thereof shall try the matter, *de novo*, summarily, and the justice or justices or Stipendiary Magistrate shall bind over, by recognizance, the witnesses to appear and give evidence at such court.

5. No petit jury shall be summoned, or hereafter attend at any General Session of the Peace for the county of Halifax.

6. [Special provisions as to County of Halifax.]

7. The Judge of the County Court may, upon good cause shewn, from time to time, postpone the trial of any criminal matter to any future sittings of the court, and in such case shall bind over the offender, by recognizance, (and if at his instance with sureties) in such sum as he thinks proper, to appear and take his trial at such future court; and he shall also bind over, by recognizance, the witnesses to appear and give evidence at such court.

8. [The County Judge may order the examination *de bene esse* of all witnesses sick or infirm or about to leave the Province before the Clerk of the Court.]

9. The jury for the trial of criminal offences in the County Court shall be seven, all of whom must agree upon the verdict.

10. The senior Queen's Counsel resident in the county, and if no Queen's Counsel reside in the county, the senior or Queen's Counsel present at the opening of the County Court, and in their absence the senior practising attorney shall be appointed by the Judge to conduct all criminal

prosecutions during the term; who shall take all proceedings for the trial of all offences in the county, and over which the County Court shall have jurisdiction: prepare indictments and prosecute; and take proceedings for compelling attendance of witnesses, &c.

11. The Clerk of the County Court shall perform all the duties connected with offences cognizable by the County Courts heretofore performed by the Clerk of the Crown, including the necessary proceedings to carry out any sentence imposed by the County Court; the binding over all witnesses in any cause, &c.

12. It shall be lawful for the presiding Judge at any County Court to tax and allow to the Queen's Counsel or attorney, for his services, reasonable costs and fees, as the Judge shall deem adequate, for the services actually performed on such prosecution; but the costs taken shall not exceed for any one prosecution the sum of six dollars for each criminal appeal, and twenty dollars for all writings, papers and counsel fees on each criminal trial; and to tax and allow to the Clerk of the County Court, for his services in each criminal appeal, a sum not exceeding two dollars, and on each criminal trial a sum not exceeding four dollars.

The above Bills seem to be well drawn, and that concerning criminal jurisdiction contains suggestions which it might not be amiss for us to profit by on some future occasion. The idea of giving a limited criminal jurisdiction to County Courts seems to us a good one, our plan being in some respects a clumsy one. The first section is an improvement on our law, which leaves many points of jurisdiction open as questions of construction The clause before us is brief, comprehensive, and complete, as regards the higher crimes: we doubt, however, the propriety of giving to these courts exclusive jurisdiction in all cases of misdemeanor. We would, moreover, suggest a careful review of the bill to see if any of its provisions are not beyond the jurisdiction of a Local Legislature. The second to the eleventh sections, excepting perhaps the fifth, seem to be unconstitutional and beyond the power of the Local Legislature. They relate either to criminal procedure or criminal law, both which classes of subjects are by the British North America Act expressly reserved for Dominion Legislation. The principle of the bill to establish the County Courts as Criminal Courts is good, and whatever provision is necessary to accomplish this may be passed by the Local Legislature; but the alternation of a substantive provision of law relating to criminal matters is clearly beyond the power of the Provincial Parliament.

It would appear that it is proposed to retain the Quarter Sessions in one county. The system should be uniform throughout the Province, unless, indeed, there are local reasons to the contrary of which we know nothing, and cannot see the force. Sections 7 and 8 refer to procedure only, and should be embodied, we think, in a general code of rules, which must also contain various other regulations to prevent uncertainty, and provide for uniformity in all the courts.

Clause 9 would make a change, the merits of which have often been discussed, and more especially with reference to civil causes. Possibly a general provision to this effect, applicable to the whole Dominion, would be desirable, and, at present, we feel rather inclined to favour such a change, but every effort should be made to assimilate our laws, and induce uniformity in all the Provinces of the Dominion.

As to the County Courts Act, some of the clauses seem too general, and those that do go into details are not sufficiently exhaustive, but it would be impossible within our limits to discuss them more at length; doubtless many of these provisions will be added to, and others made, when the bill comes before a committee of the House, and many of them will occur to the framer of the bill before that time. A careful perusal of some of our recent statutes might be found useful in this connection. The ninth clause of this Act is a more definite provision than in our County or Division Court Acts. We strongly recommend our friends not to encumber their lands with the provision for registering judgments (Sec. 22). It will be found much better to make suitable machinery for a speedy seizure and sale of the property by the sheriff under an execution. We had the same process here and had to do away with it.

But it is, perhaps, unfair to criticise further without a more perfect knowedge of what provisions the other statutes of Nova Scotia may make in the premises. We shall, therefore, conclude our brief notice by again complimenting the framer of these proposed acts upon many excellent suggestions, and an evident desire to promote the due administration of justice in his Province.

SELECTIONS.

SLANDER AND LIBEL.*

A distinguished writer upon jurisprudence has said, "I will venture to affirm, that no other body of law, obtaining in a civilized community, has so little of consistency and symmetry as our own. Hence its enormous bulk, and (what is infinitely worse than its mere bulk) the utter impossibility of conceiving it with distinctness and precision. If you would know the English law, you must know all the details which make up the mess. For it has none of those large coherent principles which are a sure index to details; and, since details are infinite, it is manifest that no man, let his industry be what it may, can compass the whole system. Consequently, the knowledge of an English lawyer is nothing but a beggarly account of scraps and fragments. His memory may be stored with numerous particulars; but of the law as a whole, and of the mutual relations of its parts, he has not a conception." †

The law of slander and libel is beset with questions of a perplexing character. It seems to have no general principle for its foundation. Although from the time of the year-books to the present the reports abound with cases upon this branch of the law, and although text-book after text-book has been written upon the subject, the questions remain as perplexing as ever. There is no simple and general rule for determining what words will and what will not support an action. While a suit can be brought for any defamatory written words, only certain classes of defamatory spoken words are actionable. Again, while written defamation is punished by indictment, redress for spoken words is given only by a civil action. No entirely satisfactory reason has ever been given for the existence of these distinctions between the law of libel and the law of slander. The reason usually given is, that written defamation has a more extended circulation than spoken words. This would seem to imply (inasmuch as the grossest slander is not, while the most trivial libel is, indictable) that the injury done to the person defamed is rather in proportion to the extent over which the defamatory matter is spread, than to the gravity of the charge itself. But the greater part of the injury done by defamation is comprised within the narrow circle of one's associates and acquaintances. The defamation of an unknown person is as void of effect as the defamation of a fictitious person would be. Within the circle to which defamation extends—and in regard to a common person that circle is more readily reached by speech than by writing—the extent of the injury done depends upon the nature of the charge made. Generally, more harm is done to character by whispered than by outspoken malice. It is the baneful effect of slander, and not of libel, which is depicted by the poet and the novelist. Again, a public denunciation by word of mouth may surely have a wider circulation than an insinuation in a confidential letter sent by post. Another reason given for the distinction is, that the tendency of libel to a breach of the peace is more direct than the tendency of slander. But this is questionable. The tongue, in matters not of government concern, has caused more bloodshed than the pen ever did. Neither can the distinction rest upon ethical grounds. A woman's chastity or a man's integrity may be called in question by word of mouth, and the law is wholly silent; but printed ridicule of the set of her dress, or the carriage of his person, lays the groundwork not only for vindictive damages, but for setting in motion the criminal law against the offender.

Certain classes only of spoken defamatory words are actionable. Why are those particular classes singled out as actionable, while other words, equally defamatory, not embraced within them, will not support an action? Oral language is, with some slight limitation, actionable *per se* when it charges an indictable offence. To charge one with such an offence tends to degrade him in the estimation of his fellows, and often to expose him to the peril of a public prosecution. Is it the degradation to which the slandered person is subjected, or is it the peril to which he is exposed, or is it both of these things together, which furnish the ground of action? Baron Parke, in *Heming* v. *Power*, 10 M. & W. 564, says, "The ground of the matter being actionable is, that a charge is made which, if it were true, would endanger the plaintiff in point of law." But it is actionable to charge the plaintiff with having committed a crime, and having been already punished for it; for example, to say that he is a returned convict. Yet by such an accusation the plaintiff is not endangered in point of law. Is it the social degradation to which the plaintiff is exposed which constitutes the ground of action? To call one a rogue, a rascal, a cheat and a swindler, is to expose him to social degradation; but it is said that such an accusation is not actionable, because it does not "endanger the plaintiff in point of law." In Alabama it has been held (*Coburn* v. *Harwood*, Minor, 93), that to charge one with the commission of a crime against nature is not actionable, because such a thing is not indictable at common law, and was not in that State a statutory offence. Sometimes it is said that the social degradation is the gravamen of the action, and that the charge of the crime is the test by which to determine whether the words are actionable. This amounts only to saying that words which tend to degrade one are actionable when they charge a crime; which is returning to the starting point, instead of giving a reason. Why must such

* A Treatise on the Wrongs called Slander and Libel, and the Remedy by Civil Action for those Wrongs. By John Townsend. Second Edition. New York: Baker, Voorhis & Co. 1872.

† Austin's Jurisprudence, Lec. xxiv.

words charge a crime in order to be actionable? To this question a satisfactory answer is wanting.

It is actionable to charge one with having the leprosy, the plague, or the syphilis; but it is not actionable to charge him with having any other disease. Such a charge is said to be actionable because it tends to degrade the person charged in the estimation of the public. A person is not degraded in public estimation by having the leprosy or the plague, but is degraded by having the syphilis. Still it is as disgraceful to have any other venereal disease as to have the syphilis, although a charge of having other venereal diseases is not actionable. In *Bloodworth* v. *Gray*, 8 Scott, N. R. 9, Tindal, C. J., says such words are actionable, "inasmuch as they import a present unfitness to be admitted into society." But this is true of the charge of having the small-pox, or an infectious fever, though such a charge is not actionable.

Again, "words spoken of a man, which scandal him in his profession or function by which he gains his living, will bear an action." To call a merchant a bankrupt is actionable, while to impute to him all the moral vices (if they are not imputed to him in the conduct of his business) is not actionable. And, lastly, opprobrious words spoken of one become actionable if they produce a special damage. In these two instances the law comes squarely down to a pecuniary test of liability. An exclusive consideration of these two instances has sometimes led judges to declare that pecuniary loss is in all cases the gist of the action. But it must be borne in mind that in the case of words actionable *per se*, it is not open to the defendant to prove that the speaking was followed by no pecuniary loss; and moreover such words would be actionable, even if it could be proved that they were followed by a pecuniary benefit. At other times it is said that pecuniary loss was originally the gist of the action, and that the law has been extended by a fiction to embrace opprobrious words in other cases where there has really been no pecuniary loss; that is to say, to give redress the court feigned that there must necessarily have been a pecuniary loss. Unfortunately for this explanation, the progress of the law appears to have been in a contrary direction. The earlier cases proceed upon the ground that a man's honorable reputation is the thing which is dearest to him. The three earliest reported cases—one in the year 1463, and two in the year 1476—are for calling the plaintiff a villain, in the feudal sense of the word; that is, for an imputation that he was base-born, and had not the rights of a freeman. Of the five next following cases, one is for calling the plaintiff a heretic, one for accusing him of perjury, and the other three are each for calling the plaintiff a thief. These eight cases are all the reported cases down to the year 1539, and in none of them is pecuniary loss the gist of the action.

It is said that to constitute slander, the speaking of the words must be with malice. Malice, if it be the name of anything, is the name of a motive—the motive of malevolence or ill-will. Words spoken without ill-will, from mere thoughtlessness, may be actionable; but in such case it is said the law implies the malice from the act of speaking, and will not admit evidence to the contrary. Hence this kind of malice which the law is said to imply is called legal malice, as differing from malevolence, which is called malice in fact; and legal malice is said to consist in speaking defamatory matter without legal excuse, because when words are thus spoken the law implies malice. Why is it not as simple to say the speaking defamatory matter without legal excuse is actionable, as it is to say defamatory matter to be actionable must be malicious, but the law implies the malice? What need is there of bringing into the law of slander the cumbrous machinery of malice for the sole purpose of necessitating the construction of other machinery—the machinery of legal implication—to take it out again? If legal malice means the want of legal excuse, which appears to be the most approved definition of it, then it means so much that it means nothing, for in that sense every act which is the groundwork of an action is malicious. In other words, malice is an ingredient of every action at law as much as it is of slander; and it is because money is maliciously retained, that is, that it is retained without legal excuse, that the plaintiff can maintain assumpsit. How came this doctrine of implied malice to be brought into a portion of the law where it has no meaning?

As the English law upon this subject was never constructed upon a plan, it cannot be resolved into one. It is a mass which has grown by aggregation, and special and peculiar circumstances have, from time to time, shaped its varying surfaces and angles. Undoubtedly the crooked and wrenched form of the law of slander and libel can be accounted for, but it must be accounted for in the way we account for the distorted shape of a tree—by looking for the special circumstances under which it has grown, and the forces to which it has been exposed. This branch of the law, like the greater portion of the English common law, is of Roman origin. Born of the Roman, and nurtured by the canon law, its distorted person evidences the violence with which it was torn from its nurse.

Before the Roman conquest, the Britons were governed by their Druids, who possessed whatever there was of civil and of criminal jurisdiction. Whether at that time there was anything worthy of the name of law, may be doubted. After the conquest, during a period of more than three centuries, Britain acquired and kept "the elegant and servile form of a Roman province." The inhabitants became Roman Britons. The emperors Hadrian, Constantius, Constantine, Maximus and Carausius at various times were there, and were severally

concerned in its government. The famous jurist, Papinian, presided in the forum at York. The judicial tribunals were Roman tribunals, and they administered the Roman provincial law. At the time of the Saxon invasion, the laws and customs of the country could have been little else than Roman laws and Roman customs.

But the conquest by the Saxons was slow and gradual, extending over the greater part of five centuries. The Roman law still held its supremacy. In the year 597 Christianity was reintroduced. Three years later Augustine and his fellow-missionaries arrived. Ten thousand persons were baptized in two years. In a very short time the idols throughout the kingdom were destroyed. A code was drawn up. The Witan, by whose advice this code was made, was partly composed of Roman missionaries. From this time forth, till long after the Norman conquest, the clergy were constituent members of the council. Literary and scientific acquirements were found exclusively among the clergy, and education was wholly in their hands. The study of Roman jurisprudence was an ordinary branch of that education. St. Aldhelm speaks of it as being so. Alcuin, who was sent for by Charlemagne to give his assistance in founding those schools which have made the name of Charlemagne so famous, and which laid the foundation of the scholastic system, was in the year 766 the principal of the school of York. He speaks of the course of instruction there as comprising grammar, rhetoric and jurisprudence. The relation between England and Rome was very intimate. The Saxon kings made frequent pilgrimages to Rome, and Ossa, king of Mercia, made a yearly donation to the pope for the support of an English college there.

Many legal duties were expressly placed upon the clergy. It was made their general duty to support every just right, to protect the weak against the powerful, the low against the high, and not to let any man be greatly injured. All the tribunals were presided over by ecclesiastics. These things were not changed by the Norman conquest. William of Normandy fought the battle of Hastings under a banner presented to him by the pope. He brought with him into England a very large number of ecclesiastics, distinguished for their knowledge of Roman jurisprudence. Indeed the clergy monopolized learning, and their services were indispensable in the business of common life. Whenever a written instrument was to be drawn, a priest must be resorted to. For a long time they were the only persons competent to act as advocates. Many of the judges of the king's court, and perhaps the great majority of all other judges and of all judicial officers for nearly a century at least after the conquest, were ecclesiastics. The law that these men administered was the Roman law, in which they were educated. Indeed there could not have been much other law in practice.

William, claiming to reign as the successor of the Anglo-Saxon kings, introduced no violent change in the form of the laws. He found a kingdom largely governed by the Roman law, the judges whom he appointed were educated in that law, and there was no reason for any such change.

But an ecclesiastical law, founded upon and growing out of the Roman law, was administered in England as well as in the rest of Europe. In England it appears to have been at this time administered in the same courts and by the same judges as the common law. By the constitutions of the Roman emperors, large judicial powers had been given to the bishops. By one constitution the bishops were charged to see that the merchants did not defraud in selling. This in itself might be no small branch of jurisdiction. By another constitution any civil matter whatever could, by consent of the parties, be litigated before the bishop. By another the judgment rendered by the bishop in such case is put upon the same footing as a judgment of an imperial court, and the judges of the imperial courts are ordered to see that the decrees of the ecclesiastical courts are executed. By other constitutions the determination of questions of testament and guardianship, of dowry, of marriage and of divorce, were given to them. Besides these matters, in England the bishops appear to have had jurisdiction of cases of buying and selling, of letting and hiring, of pledging and of fraud,* and of various matters embraced in the Roman law under the title of injuries. An injury in the Roman law meant an insult. The technical word *injuria* is synonymous with the word *contumelia*. A person might be insulted in many ways by direct force, as by beating and wounding him; or without direct force, as by shouting after him in the street, so as to cause a crowd to follow him. It was also an injury to follow an honest woman in the street, or in any way to solicit her chastity. Any reproachful language which lessened one's good fame was also an injury. This class of injuries grew in ecclesiastical law into a distinct title, that of defamation. "Diffamation, or defamation, properly so called, is the uttering of reproachful speeches or contumelious language of any one with an intent of raising an ill fame of the party thus reproached: *Defamare est in malâ famâ ponere*, according to Bartolus. And this extends to writing, as by defamatory libels; and also to deeds, as by reproachful postures, signs and gestures."†

William separated the canon from the civil law by ordering that no bishop or archdeacon should for the future hold pleas relative to ecclesiastical matters in the county court, which appears to have been the practice till this time.

There were many causes which gave the

* Glanville, Beames' tr., pp. 257, 273, 274.
† Ayliffe, Parergon, p. 212.

vast jurisdiction to ecclesiastics which they exercised in the middle ages—causes which at the present time cannot be accurately weighed or estimated. According to Bentham, they gained this great jurisdiction "imperceptibly and in the dark, in the pitchy darkness of the very earliest ages." It is easy to see that the jurisdiction was possessed by them, and it is not important for our present inquiry to ascertain the precise manner in which it was gained. To account for the growth of the ecclesiastical jurisdiction, as a jurisdiction independent of and co-ordinate with the jurisdiction of the courts of common law, we must consider that throughout Europe a great government existed independent of the separate local governments. The ecclesiastics were a nation by themselves. There was a spiritual and a temporal government. The temporal government was local, but the spiritual government was universal. The church, by its power, had taken, and each particular state, from its weakness, had granted to the church, the regulation of the larger portion of all that concerned the peaceful occupations of life. After the Norman conquest, the pope even claimed direct personal jurisdiction in England; and the claims for ecclesiastical jurisdiction and his own claims were continually strengthened and confirmed, until, in the time of Henry the Second, he had "well nigh recovered full and sole jurisdiction in all causes ecclesiastical and over all persons ecclesiastical, with power to dispose of all ecclesiastical benefices in England, whereby he had upon the matter made an absolute conquest of more than half the kingdom (for every one who could read the psalm of *miserere* was a clerk, and the clergy possessed the moiety of all temporal possessions); there remained nothing to make him owner and proprietor of all, but to get a surrender of the crown, and to make the king his farmer, and the people his villains, which he fully accomplished and brought to pass in the times of King John and Henry the Third." *

In the reign of King John, an alteration took place in the form of the king's court. By an article of his *Magna Charta* it was declared that Common Pleas should no longer follow the king. The Court of Common Pleas was fixed at Westminster, with a jurisdiction over pleas of land and wrongs not indictable. Indictable wrongs were *punished* civilly and criminally by the Court of Kings Bench, which had also further jurisdiction (to prevent a failure of justice) over suits brought against those persons who were at the time of the commencement of the suit in its custody. The Court of Exchequer, which was established by William the First, had jurisdiction to recover the king's debts and duties. The ecclesiastical courts had jurisdiction of spiritual matters. What is the meaning of the expressions, ecclesiastical matters or causes, or spiritual matters or causes, for all these expressions mean the same thing? "Let us see when this distinction of ecclesiastical or spiritual causes from civil and temporal causes did first begin in point of jurisdiction. Assuredly for the space of three hundred years after Christ, this distinction was not known or heard of in the Christian world. For the causes of testaments, of matrimony, of bastardy and adultery, and the rest, which are called ecclesiastical or spiritual causes, were merely civil, and determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate, as all civilians will testify with me. But after that the emperors had received the Christian faith, out of a zeal and desire they had to grace and honor the learned and godly bishops of that time, they were pleased to single out certain special causes wherein they granted jurisdiction unto the bishops. . . .

"This, then, is most certain, that the primitive jurisdiction in all these cases was in the civil magistrate, and so in right it remains to this day; and though it be derived from him, it remaineth in him as in the fountain. For every Christian monarch (as well as the godly kings of Judah) is *custos utriusque tabulæ;* and consequently hath power to punish not only treason, murder, theft, and all manner of force and fraud, but incest, adultery, usury, perjury, simony, sorcery, idolatry, blasphemy. Neither are these causes, in respect of their own quality and nature, to be distinguished one from another by the names of spiritual or temporal; for why is adultery a spiritual cause rather than murder, when they are both alike against the second table? or idolatry rather than perjury, both being offences likewise against the first table? And, indeed, if we consider the nature of these causes, it will seem somewhat absurd that they are distinguished by the name of spiritual and temporal; for, to speak properly, that which is opposed to spiritual should be termed carnal, and that which is opposed to temporal should be called eternal. And, therefore, if things were called by their proper names, adultery should not be called a spiritual offence, but a carnal. But shall I express plainly and briefly why these causes were first denominated some spiritual or ecclesiastical and others temporal and civil. Truly they were so called, not from the nature of the causes, as I said before, but from the quality of the persons whom the prince had made judges in those causes. The clergy did study spiritual things, and did profess to live *secundum spiritum*, and were called spiritual men; and therefore they called the causes wherein princes had given them spiritual jurisdiction spiritual causes, after their own name and quality. But because the lay magistrates were said to intend the things of this world, which are temporal and transitory, the clergy called them secular or temporal men, and the things wherein they were judges temporal causes. This distinction began first in the court of Rome; . . . and as all their courts are called spiritual courts, so all causes

* Davies Rep. The case of Præmunire.

determinable in those courts are called spiritual causes." *

Defamation appears to have been a spiritual cause. Not only defamatory matter, which is now actionable at law, was actionable in the spiritual court, but that court had jurisdiction over all injurious language, whether verbal or written. Indeed it is hard to see how courts of law could entertain suits for defamation, for such suits could not (as far as we at the present time have the means of judging) be brought within the form of any then known action.

By the statute of the 13th of Edward the First, called the Statute of Westminster the Second, the clerks of the chancery were empowered to form new writs. This statute thus gave a process by which delicts similar to trespasses, but which were not committed with force—as, for instance, slander and libel—could be brought before the common law courts. In the same year was enacted the statute *Circumspecte agatis*, which is commonly regarded by lawyers (though perhaps not by historians) as a statute passed in an endeavor to diminish the jurisdiction of the spiritual courts. According to this statute, "in case of defamation it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin." The statute defines certain cases in which "the king's prohibition doth not lie" to the ecclesiastical courts. The writ of prohibition was the writ used by the superior courts of common law to restrain other courts from taking jurisdiction of causes over which the court issuing the writ wished itself to take jurisdiction. Several cases are to be found where prohibitions were issued against suits brought in an ecclesiastical court for debt; several are to be found where prohibitions were issued against suits brought in an ecclesiastical court for trespass, and for other causes of action, over which the courts of common law had undoubted jurisdiction.

When these statutes were passed, it had long been the endeavor of the government to restrain and to fix within some bounds the jurisdiction of the ecclesiastical courts; but that endeavor met with a strenuous opposition. The common law courts resorted to prohibitions in cases where the ecclesiastical courts took cognizance of matters which might have been litigated in the common law courts. The ecclesiastical courts on their side wielded, against those who opposed them by suing out such writs, the terrible weapon of excommunication; and it was owing to the use of this weapon against King John by the pope that the barons were enabled to extort from that unhappy monarch the first *Magna Charta*. This struggle was a protracted one.

According to Bracton, it was the rule of the courts, ecclesiastical and civil, that the *accessorium* must come under the same law and jurisdiction as the *principale;* that is, that the jurisdiction over a thing drew to it the jurisdiction over all things accessory. It was by means of this rule that the Court of King's Bench, by the fiction that the defendant was in its custody, and the Court of Exchequer, by the fiction that the plaintiff was indebted to the crown, were enabled to extend their respective jurisdictions over most of the matters originally pertaining exclusively to the Court of Common Pleas. Upon this rule the common law courts appear to have worked in getting from the spiritual courts jurisdiction in matters of defamation, when, after the establishment of actions upon the case, they themselves had the means of determining such classes of injuries.

Before the invention of printing, libels were generally published by scattering the papers containing them in the streets, or by posting them in public places. Such libels were generally against the government, or against persons high in authority; and by the Theodosian code the publication of such libels seems to have been looked upon as an offence akin to treason, and was punished as a high crime. The common law of England appears anciently to have taken the same view of libel, and from the earliest times the publication of a libel has by that law been punished as a crime. Before the invention of printing, libels upon private persons must have been of rare occurrence, though two instances of such libels in the reign of Edward the Third are mentioned by Coke. In each of these cases the libeller was criminally punished. The art of printing was introduced into England in 1474, nearly two hundred years after the introduction of the action upon the case. When the knowledge of reading and writing became common, and the less injurious kinds of private libel came to the attention of the courts, they naturally would be held to be indictable as coming within the definition of the crime sanctioned by precedent; all defamatory matter in writing being libellous, and being indictable upon the criminal side of the court. After the introduction of the action upon the case, the court could consistently give a civil action for damages, both upon the ground that the principal matter—that is to say, the crime—being within its jurisdiction, that fact drew after it a civil remedy in damages as an incident, and also upon the ground that, having by the usual fiction the possession of the criminal's person, it was proper that a civil remedy should be sought against him in the court where he was, rather than that the plaintiff should be sent to the ecclesiastical court for a redress which that court, without the custody of the person of the delinquent, might be powerless to give.

Let us see what actually took place in reference to the statutes of *scandalum magnatum*. In 1275 the first, and in 1378 the second of these statutes was passed. By these statutes, slanders upon great men are made criminal

* Davies Rep. The case of Præmunire.

offences. It is enacted by the second of these (2 Ric. 2 st. I. c. 5), that "none shall devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons, and other nobles or great men of the realm," &c., upon pain of imprisonment. Under these statutes the courts gave a civil remedy coextensive with the criminal one, and the "great men of the realm," though not the common people (because the common people are not within the statute), can maintain actions for slander for any spoken defamation without alleging special damage; although the words spoken do not impute a crime or a specific disease, and although they are not spoken of the plaintiff in reference to his trade or occupation. In other words, as to great men of the realm, there is no distinction between slander and libel in respect to what words will support an action, oral and written defamation of such men being alike indictable.

Spoken words which impute an indictable crime are actionable. A court of law having jurisdiction of the offence charged, and it being the business and the duty of that court to investigate charges of crime for the purpose of punishing the offender, this jurisdiction might well be held to draw after it as an incident the right to investigate the charge, for the purpose of compensating the party injured by such a charge if it were false. But to give this jurisdiction, the imputation must be direct: a crime must be *charged*.

One might suffer as much pecuniary damage and as much loss of character from being called a thievish knave as from being called a thief. But to call one a thievish knave imputes a disposition to commit crime, and not a crime committed; and as there is nothing to which the jurisdiction of the court can attach, such an accusation is not actionable, while to call one a thief is a direct charge of crime, and is actionable. In the first case supposed, the person defamed would be left to his redress in the ecclesiastical courts; but in the second case, if the person defamed should seek redress in those courts, a court of common law might issue a writ of prohibition.

The fact that it is actionable to impute to one the present having of the leprosy, syphilis, or plague, while it is not actionable to impute the having of any other disease, and not actionable to impute the having had even those particular diseases, may probably be accounted for in the same manner. "When a person became affected with the leprosy, he was considered as legally and politically dead, and lost the privileges belonging to his right of citizenship. The church took the same view; and on the day on which he was separated from his fellow-creatures, and consigned for the remainder of life to a lazar-house, they performed over and around the yet living sufferer the various solemn ceremonials for the dead, and the priest terminated the long and fearful formula of his separation from his fellow-creatures by throwing upon the body of the poor outcast a shovelful of earth, in imitation of the closure of the grave."* The form of the writ *de leproso amovendo* was as follows: "The king, to the sheriff, &c., or to the mayor and sheriffs of London, greeting. Because we have received information that I. of N. is a leper, and is commonly conversant amongst the men of the city aforesaid, and hath communication with them as well in public as in private places; and refuses to remove himself to a solitary place, as the custom is, and as he ought to do, to the great damage and manifest peril of the men aforesaid, by reason of the contagion of the disease aforesaid; we, being willing to take precaution against such danger, as to us appertains, and which is just and hath been used to be done touching the premises, command you, that, taking with you certain discreet and lawful men of the city aforesaid, not suspected, who have the best knowledge of the person of the said I. of N., and of such disease, you go to him the said I., and cause him to be seen and diligently examined in the presence of the said men; and if you find him to be a leper, as before is said, then without delay, in the best manner you can, cause him to be carried away and removed from the communication of the said men to a solitary place, to dwell there, as the custom is, lest, by such his common conversation, damage or peril should in any wise happen to the said men. Witness," &c. As the leper was subject to this writ, the accusation of leprosy as well as the accusation of a crime might be held actionable, and upon the same ground. Persons suspected of having the plague were likewise by law removed to pest-houses and confined, so that the accusation of having this disease rests upon the same basis as the accusation of having the leprosy. To account for a charge of having the syphilis being actionable is more difficult. That disease was not known till the end of the fifteenth century. Whether upon its first appearance it was regarded as contagious, and so exposed the sufferer to a writ like the writ *de leproso amovendo*, or to any other legal form of removal and confinement, or whether the disease itself was so like in its outward manifestations to the appearance of that form of leprosy prevalent in England (which, from the best description given of the two diseases, appears to have been a fact), is a matter of conjecture. It was a disease very prevalent among the clergy, and there is abundance of evidence to show that the having it was considered no more disgraceful, at any rate to a man, than the having any other severe disorder.

Defamatory words spoken of a man, which touch him in his office or the means by which he gains his livelihood, are actionable. The earlier cases appear all to relate directly to the administration of justice. To bring such slanders as these within the jurisdiction of the common-law courts would not be difficult.

* Encyclopædia Britannica.

The following are specimens of such cases: "Skinner, a merchant of London, said of Manwood, Chief Baron, that he was a corrupt judge; adjudged, the words were actionable." "Stuckly, a justice of the peace, brought an action for these words: 'Mr. Stuckly covereth and hideth felonies, and is not worthy to be a justice of the peace.' Adjudged the action would lie, because it is against his oath, and the office of a justice of the peace, and good cause to put him out of commission, and for this he may be indicted and fined." "Cotton, justice of the peace, brought an action against Morgan for these words: 'He hath received money of a thief that was apprehended and brought before him for stealing of certain sheep, to let him escape, and to keep him from the gaol.' Adjudged the action would lie."

The growth of the law upon this point is shown by this case, decided Mich. 4 Jac.: "Carre brought an action against Rande for words, and declared that he was steward to divers great lords of their court-barons, and of the leets within their manors, and that he was steward of one A. of his court-baron, and of the leet within his manor. The defendant, of this not ignorant, said these words: 'Mr. Carre hath put a presentment into the jurors' verdict against me for 8s. 4d. for suing of Peter West forth of the court, contrary, &c., without the consent of the jury.' By the whole court, the action lies, because he doth accuse him of falsity in his office; but by the better opinion, if he had not alleged in his count that he was steward, the action would have lain."* The following case, quoted from March† (Pasch. 17 Car.), shows that at that time the rule was not well settled. "Sir Richard Greenfield brought an action against Furnace for these words: 'Thou (*inuendo* Captain Greenfield) hast received money of the king to buy new saddles, and hast cozened the king, and bought old saddles for the troopers.' It was objected that the action would not lie; and it was likened to these cases which I will cite, because they are worth the knowing: 8 Car., The Major of Tiverton's case. One said of him that the Major had cozened all his brethren, &c. Adjudged not actionable. 9 Jac., in the King's Bench: The overseer of the poor hath cozened the poor of all their bread. This was likewise said to be adjudged not actionable; but I do somewhat doubt of this case, because the words do scandal the plaintiff in his office of overseer; but to this it may be said, that this is an office of burden and trouble, and not of profit. 26 of the Queen, in the King's Bench, Kerby and Walter's case: Thou art a false knave, and hast cozened my two kinsmen; adjudged the words were not actionable. 18 of the Queen, in the King's Bench: Serjeant Fenner hath cozened me and all my kindred; adjudged the words would not bear an action. Out of which case we may, by the way, observe this for law: that if a man say of another (without any precedent communication of his office, place of trust, or profession), that he is a cozening or a cheating knave, or that he hath cozened any man thus and thus, that no action will lie for such words generally spoken; otherwise if they be spoken in reference to a man's office, place of trust, or profession. And in the principal case, it was resolved by Heath, Justice, and Bramson, Chief Justice (the other Justices being absent), that the action would lie, because the words did scandal him in his place of trust, and they said it was not material what employment the plaintiff had under the king, if by the speaking of these words he might be in danger of losing his trust or employment."

There also is an early class of cases, in which the plaintiff was an attorney. But an attorney is an officer of the court, and words spoken of an attorney in his conduct in the office of an attorney, touch the administration of justice as nearly as words spoken of a judge. To call a merchant a bankrupt was to subject him to the statutes of bankruptcy, and was held actionable upon the same principle that the accusation of a crime was actionable. That pecuniary loss was the gist of the action, or that damage to a man's business would of itself furnish a ground of action in a temporal court, appears to be an idea which originated after the Reformation, when ecclesiastical courts had lost nearly all power, and had fallen into general contempt among the people. It is founded upon the idea that every thing relating to money or business is temporal, as pertaining to the matters of this world. The ecclesiastical courts, however, retained their jurisdiction over things connected with marriage, marriage having been made by the Church a sacrament; and over matters connected with testament, from the association in the mind between religion and preparation for death. There is much evidence to show that prior to the Reformation the spiritual courts were very unpopular with the people, and an inspection of the ecclesiastical proceedings in criminal causes from the year 1475 to 1640‡ makes one wonder at a state of society in which such courts could exist. Suitors, it is to be presumed, seldom resorted to them when they could obtain redress elsewhere. It is plain that those courts had two main guiding principles—one to protect the clerks, and the other to plunder the laity.

If this account of the origin of the common law jurisdiction in matters of slander and libel is correct, it furnishes a reason for the slight mention of slander and libel to be found in the early books, and for the rapid increase of such actions after the Reformation; which led to the complaint that the intemperance and malice of men's tongues had wonderfully increased; whereas the fact was only that the intemper-

* March on Slander, p. 51. † Ib. p. 53.

‡ Hale.

ance and malice of men's tongues was more taken notice of by common-law lawyers.

By the Roman law, to constitute an *injury*, under which head defamation came, an *animus*, an intention to do wrong, was necessary. In this respect *injuries* differed from cases falling within the *lex Aquilia*. In cases falling within the *lex Aquilia*, the mere happening of the event gave the cause of action without reference to the intention of the person doing the act. By the canon law, also, a bad intent, called *malitia*, was necessary to constitute defamation. The defendant was punished *pro salute animæ*, and the matter was not looked at in a legal, but in a moral point of view, to see if the speaking of the words was a sin. When courts of law took jurisdiction of defamation, they seem to have applied to this *animus* of the Roman, or *malitia* of the canon law, the elaborate scholastic structure of malice which was being framed in the common law, and the doctrine of implied malice was introduced into the law of slander. They affirmed that malice was in all cases necessary to maintain the action, and to find a malice which did not exist they implied it. They were like men who should persist in viewing all things through smoked glass, and should light candles to enable them to see through the glass; if they should remove the glass they would save their candles and see at least as clearly as before. The whole doctrine of legal malice is pure scholasticism, and obscures with a thick fog every thing it envelopes. In actions for malicious prosecution alone has it a semblance of a meaning, while in cases of homicide it means no one knows what, and in actions of slander it means nothing.

In the case of *Toogood* v. *Spyring*,* it was decided that a statement made by a person in the discharge of a duty, public or private, legal or moral, or in the conduct of his own affairs, is a privileged communication. This is a direct return to the ecclesiastical law, resting the question of the maintenance of the action upon the question whether the publication were, or were not, in the opinion of the court, justifiable morally. Yet even in arriving at this simple conclusion the machinery of malice, express and implied, is used. Baron Parke says, "An action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice." A legal duty is a moral duty, and so is the prudent conduct of one's own affairs. Would not the meaning of Baron Parke be fully expressed by saying, An action lies for the publication of statements which are false and injurious to the character of another (within the well-known limits as to verbal slander), unless such statements are fairly made by a person in the discharge of some moral duty?

Coke was one of the principal authors of the doctrine of implied malice, and he was deeply imbued with scholasticism. There are many passages both in his Institutes and in his reports which show the tendency of his mind toward such kinds of reasoning. For instance, in *Keighley's Case*,† it is said, "And it was well observed, that every statute, ordinance, and provision which is made by force of the commission of sewers, ought to consist upon four causes: 1. The material cause, and that is the substance; 2. The formal cause, and that is the matter with convenient circumstances; 3. The efficient cause, and that is their authority according to their commission; 4. The final cause, and that is *pro bono publico, et nunquam pro privato.*"‡ Indeed scholastic philosophy flowed both into theology and into law; and theology, law, and a meaningless kind of jargon which passes for philosophy, are curiously blended in some of the old legal writers.§ It is very clearly exhibited in the doctrine of implied malice. Coke divides malice in law into three kinds: 1. In respect to the manner of the homicide; 2. In respect to the person killed; 3. In respect to the person killing. Sir Michael Foster considers implied malice to mean "a heart regardless of social duty, and fatally bent on mischief." Therefore the old allegation in an indictment, "moved and instigated by the devil," is an allegation that the homicide was committed with malice in law. Coke thought that a felony was a deed done *felleo animo*, with an intention acted upon by gall. Hale says the reason a lunatic cannot commit a crime is, that he has no gall. If he had any meaning, he must have meant that the gland necessary to secrete that fluid was absent in the lunatic, or else that it did not discharge its office.

The science of special pleading probably owes its origin to the scholastic education of the lawyers. The oral pleadings, as seen in the year-books in the time of Edward the Second, have an unmistakable similarity to the forms of scholastic disputation. The peculiar and exceptional mode of framing the declaration in actions of slander and libel, by which the words spoken are thrown into a direct proposition by means of averments and inuendoes (and which form was probably adopted for the purpose of showing the court that it had jurisdiction of the subject-matter

* 1 C. M. & R. 181.

† 10 Rep. fol. 139.

‡ See also case of Sutton Hospital, 10 Rep. fol. 1.

§ 3 Inst. 229; Plowden, 354; Popham, 43.

to which the defamation was regarded as an accessory), sometimes led the judges to apply logical tests to the words spoken, as if the words were propositions in themselves, and as if as such they were a distinct subject of predication. They sometimes lost sight of the question whether the matter was defamatory in seeing whether the matter could be stated logically as a proposition true in fact. For instance, take Hasselwood and Ganet's case: "'Whosoever is he that is falsest thief and strongest in the county of Salop, whatsoever he hath stolen or whatsoever he hath done, Thomas Hasselwood is falser than he.' Resolved that the words were actionable, with an averment that there were felons within the county of Salop; but for default of such averment the judgment given in the Common Pleas was reversed in this court."* Here if the defendant intended to call Hasselwood a thief, and the bystanders understood that he was called a thief, he was slandered whether there were or were not thieves within the county. The courts of the present day would not require an averment and proof of the existence of a devil before holding a publication libellous which should impute to one the commonly understood attributes of Satan. This way of looking at the subject accounts for the unreliability of many of the old decisions.

Mr. Townsend has an introductory chapter upon language as a means of effecting injury. We do not think injuries done by language can be classified together for any useful purpose. One who instigates an assault by offering money to one who will commit it, inflicts an injury by means of language for which he is civilly responsible in damages. We think that for any useful purpose of legal classification, such an injury might as well be classed with defamation as those injuries called malicious persecution, fraudulent representations, or even those called slander of title. The treating together of distinct things because they have an unessential similarity cannot tend to the clearness of ideas. The author has five chapters in which he endeavours to analyze the subject of slander and libel and to ascertain its general principles. His effort is ingenious and his work well done, but we cannot agree with him, because we do not believe in the existence of any such principles in this branch of the law. The book exhibits evidence of great pains and thought, and of a remarkable thoroughness of research. It is an endeavour to treat this branch of the law philosophically, but from its philosophy we dissent totally.

This is the best treatise upon the subject of slander and libel, because by it one gets ready access not only to the early but to the latest decided cases. The latest decided cases upon this subject *make the law*. We are sorry to see so much learning and talent and patient research expended in an attempt to classify under general principles a branch of the law which in our opinion does not admit of such classification. Any one having occasion to use a book upon slander and libel for practical purposes will find this well adapted to his need. What fault we have to find is not with the author but with the subject.

* March on Slander, 118.

Note.—During the time of the civil wars, and indeed throughout the middle ages, and till a much later time (as the practice of duelling shows), those holding the rank of gentlemen were not backward to right themselves if they were defamed by those holding an equal rank. The following letter, written the tenth of July, 1461, and preserved among the Paston letters, throws light upon society at the time it was written.

"To the worshipful John Paston, and William Rokewode, Esquires, and to every each of them.

"Right worshipful Cousins, I recommend me to you; and for as much as I am credibly informed how that Sir Myles Stapylton, knight, with other ill-disposed persons, defame and falsely noise me in murdering of Thomas Denys the coroner; and how that I intend to make insurrections contrary to the law; and that the said Stapylton farthermore noiseth me with great robberies, in which false defamations and false noisings the said Stapylton (in that his saying), he is false; that know it God. And for my plain acquittal, if he or any substantial gentleman will say it and avow it, I say to it contrary; and by license of the King to make it good as a gentleman. And in this my plain excuse, I pray you to open it unto the lords, that the said Stapylton, &c., make great gatherings of the King's rebels lying in wait to murder me; and in this I may make open proof. Written in haste the 10th day of July, in the first year of the reign of Edward IV. "John Berneyr."

—*American Law Review.*

THE LAW OF COPYRIGHT.

For some thirty years, reprints of English copyright works have been supplied to Canada by United States publishers. When the work was registered in Canada, our custom houses collected a duty of ten per cent., and the Government paid the amount over to the author. But most authors, by neglecting to register, lost the benefit of the provision in their favor. When the Canadian market increased in dimensions, and enough reprints were sold here to justify a separate republication for this country alone, our publishers began to ask themselves why all the profits of this business should go into the coffers of foreign publishers. One of them, Mr. Lovell, of Montreal, set up a printing establishment on the American side of the lines, at Rouse's Point; and by this means made his reprints foreign in order to place himself on a level of advantage with the American publisher in competing for the supply of this market. Strong efforts were made, principally through Sir John Rose, to bring English publishers to

some amicable agreement as to the conditions on which Canadian reprints could be issued, but in vain. Last session the Ottawa Government introduced a measure to cut the knot of the difficulty. It provided for the republication of English copyrights, in this country, on condition of the payment of a royalty of ten per cent. to the author. The bill met the opposition of authors and publishers in England; and the Copyright Association proposed a substitute which we apprehend it will be impossible to accept. Under the bill of last session, American reprints would be excluded from Canada; a provision, it is to be feared, more in the interest of publishers than of the public. The number of English works that could be reprinted in Canada is comparatively small; and if we are to lose the advantage of the cheap American reprints, the general public would probably lose as much as it would gain by the measure. The Copyright Association wish to make republication in Canada a matter of arrangement in every case; and to retain the right of registering for American reprints, in case no Canadian edition were published. They went farther, and insisted on a power to compel Canadian publishers of reprints to take up every work indiscriminately. These conditions should be regarded as out of the pale of negotiation.

Meanwhile the Canadian copyright bill is arrested by the exercise of the Imperial veto. This act of the Imperial authority is not intended finally to destroy the work of our Parliament or even as a protest against the principle of the bill. It is found that the Dominion Parliament overstepped the limits of its authority in passing the measure, and the veto is an official declaration of that fact. But there is no desire, on the part of the Imperial Government, to thwart the wishes of Canada, on this question; and it is understood that if our Parliament shows that it has undergone no change of view, by re-enacting the vetoed bill, the necessary constitutional authority will be given to allow it to go into operation.

English authors and publishers claim as absolute a right to property in their copyrights in Canada as in England. That claim Canada, a self-governing country, cannot admit. They might as well claim that a copyright should not be restricted to limits of time, as to deny this limitation of space. For reasons universally recognized to be well-founded, the enjoyment of copyrights is restricted in point of time. Have they not an equally well grounded limitation in point of space? More so, it would seem, for all limitations of time are more or less arbitrary, but the limitation of the powers of self-government arise out of the nature and are founded on the necessity of things. We deal with English patents as we please; the taking out of a patent in England does not give the Englishman a monopoly of the Canadian market. The argument that an author has a right to the enjoyment of property he creates, in all countries, proves too much; it proves that, by the copyright laws of all nations, various as they are, he is robbed of his rights by the limitation of the time he is permitted to enjoy them. When a man is on the point of making all the rest of mankind wrong, he will do well to consider whether he be so certainly right himself.

In its main features the vetoed bill will of course be re-enacted. If it be found that, on the point above mentioned, it is less favorable to the general public than to publishers, it will be necessary to consider whether an amendment cannot be introduced. The Copyright Association may use hard names; but all we need care about is to feel convinced that we do not deserve their censure. The bill of last session secured the author ten per cent. on the retail price of the book; a very fair remuneration, seeing that he can prove no absolute right to a monopoly of this market. Under the old law he hardly ever registered; and he ought to thank us if we save him the trouble. We trust there will be no negotiation with the Copyright Association; for we cannot hold the exercise of our rights subject to conditions. English editions are, as a rule, made for public libraries, and are too costly for this market. English authors hardly ever take the trouble to profit by the American reprints circulated in Canada; and if we carry into effect a law by which reprinting for this market will be transferred to our publishers, and authors are secured a ten per cent. royalty upon the work, they will certainly be gainers by the change; though we have no intention of attempting to convince them of the fact against their will. We only say this in self-justification.—*Monetary Times and Trade Review.*

REFUSING TO RECEIVE GUESTS AT A HOTEL.

The recent ejection of Mrs. Woodhull and Miss Claflin from a New York hotel on the ground that they were disreputable characters; and the still later refusal of the proprietor of the Grand Union, at Saratoga, to receive as a guest Miss Josephine Mansfield,—a witness in the impeachment trial—call attention to the rights and obligations of a hotel or innkeeper in regard to receiving guests.

It is a very old and very well-settled rule of the common law, that an innkeeper is not, if he has suitable rooms, at liberty to refuse to receive a guest who is ready and able to pay for accommodation. There are said to be exceptions to all rules, and we have turned over the cases to discover if there is an exception to this, allowing a hotel keeper to reject a guest of doubtful character.

So venerable an authority as Rolle's Abridgment lays down this rule: "*Si un hôtelier refuse un guest sur pretence que son maison est pleine de guests, si cet soit faux, action sur le case git.*" (1 Roll. Abr., 3 F.;) and Lord Bacon says, "If one who keeps a common inn refuse

either to receive a traveller as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at the suit of the party grieved, but also may be indicted and fined at the suit of the king." Bac. Abr., *Inns and Innkeepers.*

In *White's case*, Dyer, 158 "It was argued *per curiam*, that if a guest come to a common innkeeper to harbor there, and he say that his house is full of guests, and do not admit him, etc., and the party say he will shift among the other guests, and he there be robbed of his goods, the innkeeper shall not be charged because he refused the guest. And if the cause of the refusal be false, the guest may have his action on the case for his refusal." And Lord Kenyon, in *Kirkman* v. *Shawcross*, 6 T. R. 17, says, *arguendo:* "Innkeepers are bound by law to receive guests who come to their inns; and are also bound to protect the property of those guests. They have no option, either to receive or reject guests, and as they cannot refuse to receive guests, so neither can they impose unreasonable terms upon them." See, also, *Bennett* v. *Mellor*, 5 T. R. 274; *Thompson* v. *Lacy*, 3 B. & Ald. 285; *Newton* v. *Trigg*, 1 Sower 270; *Hawthorne* v. *Hammond*, 1 C. & K. 404.

But the guest is not entitled to be received and entertained unless he tender the innkeeper a fair remuneration for his accommodation; for the latter is not obliged to give credit. Bro., *Action Sur Case*, 76; Bro., *Contracts*, 43; 9 Co. 87, b. When, however, a guest is rejected, the fact that he had not tendered the price of his entertainment is no defence to an action against the keeper where the rejection was not on that ground; nor is it a defence that the guest was travelling on a Sunday and at an hour of the night after the keeper's family had gone to bed, nor that the guest refused to tell his name and abode, as the innkeeper has no right to insist upon knowing those particulars: but if the guest come to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him: *Rex* v. *Ivens*, 7 C. & P. 213. In this case Coleridge, J., said: "The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received." See, also, *Howell* v. *Jackson*, 6 C. & P. 723. While travelers are entitled to proper accommodations they have no right to select a particular apartment nor to use it for purposes other than those for which it was designed: *Fell* v. *Knight*, 8 M. & W. 269.

So far there appears to be nothing in the cases indicating a right in a publican to exclude persons on any ground save disorderly conduct and, undoubtedly, drunkenness. But some of the American cases go farther and intimate a right to exclude persons of bad habits or character. In *Jencks* v. *Coleman*, 2 Sumn. 221, which was an action for refusing to take plaintiff on board defendant's steamboat, the ground of the refusal was that plaintiff was agent of a rival line, and had been in the habit of going aboard defendant's steamboat to solicit passengers for his line. Story, J., charged the jury that the defendant had the right to refuse to admit on board persons "who refused to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful, or dissolute, or suspicious; and *a fortiori* whose characters are unequivocally bad."

The analogy between the rights and duties of common carriers and innkeepers is very close, so that this decision of Judge Story has a strong bearing on the rights of innkeepers to refuse guests. But in *Markham* v. *Brown*, 8 N. H. 523, we have some remarks directly in point: Parker, J., after speaking of the duty of an innkeeper to receive guests, said: "But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition. * * * He is indictable if he usually harbor thieves, and he is answerable for the safe-keeping of the goods of his guests, and he is not bound to admit one whose notorious character as a thief furnishes good reasons to suppose that he will purloin the goods of his guests or his own. * * * So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition would subject his guests to annoyance." See *Pinkerton* v. *Woodward*, 33 Cal. 557.

We have been able to discover no other American cases having a bearing on the subject, and even the two cases above quoted did not involve the question, and the remarks were obiter. But we have little doubt that the courts would sustain an exception to the general rule, sufficiently broad to permit hotel keepers to exclude persons of undoubtedly disreputable character.—*Albany Law Journal.*

At a Livingston justice's court a somewhat too willing witness was placed upon his *voir dire* by a suspicious attorney, and inquired of touching his interest in the event of the suit. The witness was too ready to acquit himself of the charge, and replied in the negative with great alacrity. The lawyer pressed his interrogatories closer home, thus: "Witness, do you pretend to say, under your oath, that you have no interest in the event of this suit?" "Not the first red," was the prompt reply. "Do you mean to be understood that you would as soon see one party beat as the other?" "Yes, your honor," was the answer, "and if anything a little rather." The last answer did the business.—*Pittsburgh Legal Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

Nordheimer v. Shaw.

34 Vic. cap. 12 sec. 12 (Ont.)—Notice of trial—Computation of time—Ejectment.

Held, that the "two clear additional days to the time now allowed by law" for service on the agent of a country attorney, under the above statute, mean the insertion of two days between the day of service and the day of the happening of the event to which the notice relates. A service of notice of trial on the Toronto agent of a country attorney on Saturday for Monday would be sufficient.

[Chambers.—*Mr. Dalton—Galt, J.*]

Ejectment—The plaintiff obtained a summons, calling on the defendant, his attorney or agent, to show cause why the order changing the attorney for the defendant, herein made on the 29th day of December, 1871, should not be rescinded, and the service thereof, and the notice limiting the defence, and the service thereof, should not be set aside with costs, on the ground that the said order was not obtained, and the change of attorney was not made *bonâ fide*, but as a tricky abuse of the practice of the Court, for the purpose of throwing the plaintiff over the next Toronto assizes, and that the said notice is only given for the same reason and on grounds disclosed in the affidavit and papers filed; or why the plaintiff should not be at liberty to amend his issue book served herein by adding thereto the notice limiting the defence, or to serve a new issue book without prejudice to the notice of trial served for the next Assizes, which shall stand good on the ground that the said notice was given after the service of an issue book and notice of trial, and on grounds disclosed in the affidavits and papers filed, and on reading the affidavits and papers filed on obtaining the said order changing the attorney.

The writ in this case was issued on the 9th December last. On the 11th, service was accepted by Mr. R., defendant's attorney, and on the 27th he appeared, and by his notice claimed all the land described in the writ. The next day the plaintiff served issue book and notice of trial. On the evening of the day after (29th December), a clerk in the firm of M. & B. served the plaintiff's attorney with an order made that day, changing the attorney from Mr. R. to a Mr. W., and a notice limiting the defence to a part of the land claimed. The next day the plaintiff's attorney inquired of M. & B. who Mr. W. was, and was told that they did not know, as they had served the papers for S. R. & M., in whose office the papers served, and the affidavits on which founded had been prepared. Mr. R. was the booked agent for Mr. W.

C. S. Patterson (instructed by Mr. R.) shewed cause, and filed an affidavit of the latter, stating that the notice limiting the defence was given in good faith, and for the purpose of limiting the defence to about seven or eight acres out of twenty or thirty claimed in the writ, and being all the premises of which the defendant had possession, and for which he intended to defend.

Hector Cameron supported the summons.

Several points were touched upon on the argument, but it is only material here to refer to that upon which the case was decided, viz: as to the meaning of the words "two clear additional days to the time now allowed by law for such service shall be added," given in the 34 Vic. cap 12, sec. 12, when papers are served on the Toronto agent of an attorney residing in the country.

The following authorities were cited: *Morell* v. *Wilmott*, 20 C. P. 378; *Vrooman* v. *Vrooman*, 17 C. P. 528; *Phillips* v. *Winters*, 8 P. R. 312, 10 U. C. L. J. 161; *Buchanan* v. *Bette et al.*, 2 C. L. J. N. S. 71; *Harrison* v. *Caul*, 8 F. & F. 277; *Grimshawe* v. *White*, 12 C. P. 521; *Ikin* v. *Plevin*, 5 Dowl. 594; *Blake* v. *Done*, 7 H. & N. 464; *Chadsey* v. *Ransom*, 17 C. P. 629; 34 Vic. ch. 12 sec. 12 (*O.*); C. L. P. Act sec. 222; Eject. Act secs. 8, 12.

Mr. Dalton.—The only ground upon which the plaintiff can complain of the matter alleged, must necessarily include injury to himself. Under proper circumstances all the acts done the defendant had a right to do, but the plaintiff objects to the alleged motive for the acts, the time and manner of doing them, and the intention with which they were done to gain by indirect means an advantage over him, which he alleges is an abuse of the practice The first question, therefore, is, has the plaintiff suffered any embarrassment from the acts he complains of.

The defendant's notice limiting his defence was served on Friday. That would render necessary the delivery of an amended issue, and new notice of trial, and I will suppose an application in Chambers So that the morning of Saturday was the earliest time that these steps could be taken. Would that have enabled the plaintiff to get down to trial by Monday, for the following Monday is a good notice of trial, when served on the attorney—not on his agent in Toronto. Sec. 12 of 34 Vic cap. 12, enacts that when served upon the agent of the attorney in the cause *in Toronto* "two clear additional days to the time now allowed by law for such service shall be added."

The expression "clear days" when applied to the time for a notice, is very well understood. It means the days included *between* the day of service, and the day for the performance of the act, or the happening of the event, to which the notice relates—in common terms, the first and last days are both excluded. This is the meaning of the term "clear days," and it is the only meaning.

Now Monday for Monday is *six* clear days—Saturday for the Monday week next following is *eight* clear days. Then would not the service in this case on the Toronto agent of defendant's attorney have given the two clear additional days which the statute prescribes? I think it would.

The use of the word "clear" in the statute is unfortunate. In *lengthening* a notice, it is not possible to add days which are not clear days, for there are already in the original notice a first and a last day, and there are no more in the lengthened notice, so that the added days must be clear days.

If I am right in the construction of the statute, *both* parties were, I think, in error in supposing

that a service on Saturday would have been insufficient.

I think under the circumstances of the case the summons should be discharged without costs.

From this judgment the plaintiff appealed by summons to a judge, which came on for hearing before Mr. Justice Galt, when

C. S. Patterson shewed cause.

Osler, contra.

Galt, J.—I felt some doubt upon the point decided by Mr. Dalton, but after consideration, I think the view he takes is the correct one. The question of the *bonâ fides* of the defendant's attorney does not properly come before me on this summons. I am not, therefore, called upon to make any remark on the circumstances which are detailed by the plaintiff to set aside the proceedings of the defendant on the ground of trickery.

Summons discharged.

IN CHANCERY—MASTER'S OFFICE.

Re McMorris.

Dower.

A widow who has barred her dower in a mortgage, given by the husband for his own debt, is entitled to have the mortgage paid off by the husband's assets. If she claim dower merely out of the equity of redemption, she has priority over creditors, but if out of the *corpus* of the property, she is postponed to them. On a sale of the lands, as soon as the debts of the husband are paid, she takes precedence over the heir and volunteers, claiming under the husband, and becomes absolutely entitled to her rights as dowress in the balance of the proceeds. *Sheppard* v. *Sheppard*, 14 Grant, 174, noticed.

[May, 1872, *Mr. Boyd.*]

In this case land mortgaged by the testator was ordered to be sold, and by consent of the widow her rights as dowress were to be ascertained in the master's office. She also claimed dower in lands for the purchase of which her husband had been in treaty with the Crown.

Mr. Holmested for the widow.

Mr. McWilliams for the legatees.

Mr. Boyd.—The widow's position in equity seems to be this: having barred her dower in a mortgage in fee given by her husband for his own debt, he covenanting to pay it, she surviving her husband is, in one aspect, in the position of surety for the debt, and can claim that the mortgage should be paid out of the husband's assets, so as to relieve her estate in the land. If she claims dower merely out of the equity of redemption, that would be given her of course in priority to creditors, but if, as here, she claims dower out of the whole *corpus* of the mortgaged land, then she cannot do this to the prejudice of creditors. According to the decisions of this court, general creditors would have the right to marshall the mortgage debt upon the land mortgaged to the prejudice of the widow's dower. But after payment of creditors her rights as dowress accrue absolutely to a life estate in one-third of the lands mortgaged or of the proceeds of the sale thereof. When the mortgage is paid out of the testator's assets, as in this case, by a sale of the lands, it is equivalent to a payment by the testator himself, so far as the dowress is concerned. Had the mortgage been redeemed by the heir out of his own moneys, questions of contribution by the widow would have arisen, which do not arise in the present case. The wife simply bars her dower with a view to secure the debt due by her husband: when that debt is paid by the husband's estate, she is remitted, as against the heir and volunteers claiming under the husband, to her full rights as dowress in the whole estate mortgaged. *Sheppard* v. *Sheppard*, 14 Grant, p. 174, and the passage from Park cited with approval therein are authorities for these positions. I do not regard this case as over-ruled save in so far as it decides that creditors are to be postponed till dower is paid out of the mortgaged estate, see *White* v. *Bastedo*, 15 Gr 546, and *Thorpe* v. *Richards*, ibid, 403. I do not see upon what principle her claims to dower should be postponed to the legatees in the will named, and indeed by the decree, on further directions, they are only to be paid after the satisfaction of all other claims. As to arrears she can only have these upon contributing one-third of the interest on the mortgage debt since the death to the time of the sale.

Craig v. *Templeton*, 8 Gr. 483, goes to the limit of the law, and that case cannot be extended to meet the present, where the right to a patent was cancelled in the testator's life, and by a mere act of grace was it given to his child afterwards.

McMaster v. Hector.

Computation of subsequent interest.

Former practice in respect to computation of subsequent interest now altered, except in certain cases. Subsequent interest should be computed upon the aggregate of principal, interest and costs, which the puisne incumbrancer has paid for redemption money.

Upon the principal money, subsequent interest should be regulated by the rate fixed in the mortgage security—upon the interest and costs, only statutory interest should be computed.

[June, 1872, *Mr. Boyd.*]

This was a foreclosure suit in which a second mortgagee had redeemed the plaintiff. A question arose as to what subsequent interest should be allowed the party who redeemed.

Mr. Boyd. — By the old practice of the court, a master's report computing interest on the principal money secured by mortgage, ascertaining what was due and fixing a time for payment, was equivalent to a judgment at law in converting such interest into principal money. If the sum so found due was not paid, subsequent interest would be computed on the whole, interest and principal, *Bacon* v. *Clerk*, 1 P. Wms. 478; *Creuze* v. *Hunter*, 2 Ves. Jr. 159; *Perkyns* v. *Baynton*, 1 B. C. C. 574. The same rule applied where part of the sum found due by the report consisted of *costs*, *Bickham* v. *Cross*, 2 Ves. Sr. 471; *Bruere* v. *Wharton*, 7 Sim. 483. The old rule, however, is now otherwise, and only the principal carries interest, except where a favour is asked by the mortgagor in the way of extending the time for payment, *Whatton* v. *Cradock*, 1 Keen, 267; *Holford* v. *Yates*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268, and where a later mortgagee or incumbrancer

pays off a prior mortgagee under a foreclosure or redemption decree, *Thackwray* v. *Bell*, Fish. on Mortgages, app. 671; Daniell, prac., 4th ed., p. 1125; Seton, 144, 375, 489.

Subsequent interest, therefore, should be computed upon the aggregate of principal, interest, and costs, which the puisne incumbrancer has paid for redemption money. This, in Seton, is said to be "the settled practice of the court," page 375. As to the rate of interest upon the principal money, that should be regulated, I think, by the rate fixed in the mortgage security, which has been redeemed. In the present case that is 8 per cent.: to lessen it would be to give the mortgagor a benefit which he has no right to claim. Subsequent incumbrancers cannot complain that the same rate of interest is maintained till the mortgagor himself redeems. The incumbrancer who redeems is substantially in the position of an assignee of the mortgage. As to the subsequent interest upon interest and costs, that being allowed by the *cursus curiæ* should be not eight per cent. as in the mortgage, but only the statutory rate of six per cent; see *Astley* v. *Powis*, 1 Ves. Sr., 496.

McMillan v. McMillan.

Administration suit—Examination de bene esse—Costs.

If in an administration suit fraud is charged in the pleadings, it may be proper for defendants to examine the plaintiff thereupon in order to disprove the charge, even though they succeed in the objection that a proceeding by bill was not necessary.

In examinations *de bene esse* if the evidence is not used and the witnesses are within reach of subpœna, the costs of the examination should not be allowed. Where the evidence is material and is used, the costs become costs in the cause.

[13th September, 1872, *Mr. Boyd.*]

This was a case where the defendant was allowed his costs, occasioned by the plaintiff having set the case down for examination of witnesses and hearing. The defendant claimed the costs of an examination of the plaintiff before a special examiner, and the costs of certain evidence taken *de bene esse*.

Mr. McDonald for the plaintiff.

Mr. McGregor for the defendant.

Mr. Boyd.—This is an administration suit in which a bill was filed because certain specific charges of fraud were made against the executors. It was not necessary to file a bill so as to charge fraud in the pleadings, as all the matters complained of could have been investigated in the master's office, under the usual administration order. Yet if a charge of fraud is made in the pleadings, it may be proper for the defendants to show that such a charge is unfounded, and to address evidence to this point. Had the examination of the plaintiff herein been with a view to show that the charge of fraud was without foundation, I should have inclined to allow the costs, but so far from this being the case there is not a single word of the examination which relates to these fraudulent charges: so far as the fraud is concerned the whole is irrelevant, and relates to matters of account. This is evidence which the court would in no view have listened to at the hearing, and the costs of the examinations should be disallowed for the same reason that costs of witnesses to immaterial circumstances are invariably disallowed.

It is also claimed to tax the costs of the examination of some witnesses who were examined *de bene esse*. This evidence was not used at the hearing, and, as I understand, it could not have been used, as the witnesses themselves were then within reach of a subpœna. In such a case the costs cannot be taxed. If such evidence is material and is used then the costs of it become costs in the cause to the successful party. I find no express decision upon this point, but the reasoning of Macaulay, C.J., in *Pegg* v. *Pegg*, 1 Cham. R. 193, applies, though upon the facts and the previous practice his decision was over-ruled by S. C., 7 U. C. R. 220. In suits to perpetuate testimony the defendant's costs are as a rule paid by the plaintiff, as the preservation of the evidence is regarded as a favour granted to him. In examinations *de bene esse* it depends upon the event whether the costs go to the party instituting such an examination. Here, it may be, the evidence will be available in questions of account in the master's office, and in that view the defendant may yet get the costs. Reference may be made to *Curling* v. *Robertson*, 2 D. & L. 807, S. C. 7 M. & G. 525; *Bridges* v. *Fisher*, 1 Bing. N. C. 510; *Hawkins* v. *Baldwin*, 16 Q. B. 875, 880; *Bölin* v. *Mellidew*, 20 L. J. C. P. 172.

CORRESPONDENCE.

Ontario Law Reports.

To the Editor of the Canada Law Journal.

Sir,—There seems to be a pretty mess with that question—*law-reporting*—although why there should be, it is very hard to understand. The following observations may attract the attention of the Benchers who have charge of the business, if they read your journal, which I hope they do.

1. The third volume of the Chancery Chamber Reports is still *incomplete*. The last case reported therein was argued on 19 December, 1871. Nothing has occurred in Chancery Chambers to justify a report since—such is the inference, but such is not the fact. Ten months, and no case in Chancery Chambers worthy of a report!—bosh! I could mention fifty cases at least which ought to have been reported during that period; cases—the judgment, in which would be found most useful to the profession; cases which ought to have been reported. The *authorized* reports had better be abolished than exist as a mere farce. Is it not a farce to say we have an authorized edition of Chancery Chamber Reports, that the third volume was commenced in January, 1870, is now incomplete, having in nearly

three years managed to get into a shape of 488 pages, with no reported case since December, 1871. Mr. Cooper is not now the reporter. In July last Mr. Grant was by the Benchers continued as reporter to the Court of Chancery, and was also requested to report the Chamber cases. I do not pretend to fix the responsibility on the *late* or the *present* reporter. I leave the authorities to do this, as to them may seem just.

2. Mr. O'Brien has very properly completed his volume of Common Law Chamber Reports (volume 5.) This gentleman is not now the reporter, having also, in July last, been superseded by the reporters to the Court of Queen's Bench and Common Pleas. The last case reported in his volume (No. 5) was decided on 27th December, 1871; and so in this court the same difficulty as to the reporting also exists, with this difference, that the current volume of Common Law is complete, and that of the Chancery Chambers is not so. Mr. O'Brien has, however, being one of the editors of the *Canada Law Journal*, through that publication, continued the Common Law Chamber Reports since his last vol. (No. 5.)

Your obedient servant,

Chambers.

Toronto, Nov. 12, 1872.

[As to the Chancery Chamber Reports, we find, on enquiry, that the first number of the coming volume is printed, though not issued. We understand the Digest is in course of preparation.

With reference to cases in Chancery Chambers and in the Master's office, we may mention (though this is not material to the gist of our correspondent's remarks) that a large number of these cases have been reported by us, and thus seen by the great majority of the profession.

As regards the Common Law Chamber Reports, cases worth reporting have been given to the profession in this journal, this course being thought the most advisable, pending the final settlement of the arrangements regarding Law Reporting, which, we doubt not, the Benchers will put into a satisfactory shape the ensuing Term. When this is done, we shall advise our readers of the result of the deliberations of those who have the matter in hand.]—Eds. C. L. J.

REVIEWS.

The Southern Law Review: Oct., 1872. Vol. i., No. iv. *Nashville: Reid & Purvis.* The earlier numbers of this handsome quarterly have not, with one exception, reached us. This number which completes the first volume, contains five papers or essays on legal subjects; a number of book notices, and three series of digests of cases; one of the English reports, another selected from the reports of various States, and the third of Tennessee decisions. Among the original articles there is a very good *resumé* of the law relating to life insurance, as expounded by recent decisions. A paper on "Bank Cheques" acutely criticises the faulty definitions of various authors as to what a cheque is and what it is not, and discusses the legal effect of a draft upon a banker payable so many days after sight. In the article entitled "Roman Law," the author anticipates the "glorious era when Papinian and Ulpian shall be of equal authority with Hardwicke and Mansfield, and Pothier and Savigny shall be quoted with Kent and Story." He points out the great obligations of the English law and the old English authors to the civil law, and then elucidates some of the peculiarities of the Roman system. It is a scholarly, well-written paper—by far the best in the number. The remaining articles on "Acceptance of bills of exchange," and on "Presentment for acceptance" are by the same author, and are, we should say, two chapters of a treatise to be published on bills of exchange and promissory notes. Great industry in the citation of cases from English, as well as American sources, is apparent on the face of its pages, and we judge them to be well suited to the exigencies of the practising lawyer. Altogether, we are most favourably impressed with this new enterprise. It betokens the re-establishment of learned leisure in the south. We shall be most happy to place it on our list of exchanges.

The American Law Register *for July and August* have only lately come to hand, owing to some delay in the publication, we believe. The specialty of this journal is the monthly collection of leading cases from the various courts of the republic, with annotations thereon by the eminent jurists who are among its contributors. Prominent among these is Dr. Redfield, whose fearless comments upon judicial conclusions are always pointed and suggestive. There is an admirable paper by James Parsons, in the August number, entitled, "The Ancient Commonwealth," which condenses the results of the treatise of M. de Coulanges upon Greek and Roman institutions. This, though lengthy, we shall endeavour to find room for in a subsequent number. Why does not Mr. Parsons translate and annotate this *magnum opus* of the French author for the American public? And by that we mean

to refer to the Canadian part of the continent, as well as that other larger part, which larger part sometimes forgets that it does not comprise the whole Continent.

The United States Jurist *for July and October* received. We are particularly pleased with the book notices for their vigour and impartiality, and the legal intelligence for its piquancy and variety. The editor suggests that the English council of law-reporting would confer an especial favour if they made up lists shewing the causes appealed and the results of the appeal, as to the judgment of the court below being affirmed, reversed or modified, so that the reader consulting reports of an English court of first instance might see readily whether any particular case had been considered in appeal, and, if so, with what result. This is a kind of compilation which may very well be made a part of the new system of reporting in this Province.

APPOINTMENTS TO OFFICE.

COUNTY JUDGE.

DANIEL MACAROW, of the Town of Picton, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County Court of the County of Prince Edward. (Gazetted July 27th, 1872.)

DEPUTY JUDGE.

JAMES ALEXANDER HENDERSON, of the City of Kingston, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Frontenac. (Gazetted June 22nd, 1872.)

SHERIFFS.

JAMES FLINTOFT, Junior, of the Town of Sarnia, Esquire, for the County of Lambton, in the room and stead of James Flintoft, Esquire, resigned. (Gazetted July 6th, 1872.)

GEORGE KEMPT, of the Town of Lindsay, Esquire, for the County of Victoria, in the room and stead of Neil McDougall, Esquire, deceased. (Gazetted July 20th, 1872.)

COUNTY ATTORNEY.

JOHN O'DONOHOE, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney in and for the County of York, in the room and stead of Rupert Mearse Wells, Esquire, resigned. (Gazetted Sept. 14th, 1872.)

DEPUTY CLERK OF THE CROWN AND CLERK OF THE COUNTY COURT.

JOHN YATES ELWOOD, of Osgoode Hall, Esquire, Barrister-at-Law, for the County of Huron. (Gazetted September 14th, 1872.)

INSPECTOR OF DIVISION COURT CLERKS.

JOSEPH DICKEY, of the Village of Uxbridge, Gentleman, Inspector of the Offices that are not situated in County Towns throughout the Province of Ontario. (Gazetted September 28th, 1872.)

NOTARIES PUBLIC FOR ONTARIO.

GEORGE WILLIAM HERBERT BALL, of the Town of Galt, Esquire, Barrister-at-Law.

JAY KETCHEUM, of the Town of Lindsay, Gentleman, Attorney-at-Law. (Gazetted June 1st, 1872.)

HENRY HATTON STRATHY, of the Town of Barrie, Esquire, Barrister-at-Law.

EDWARD BURNS, of the Village of Elora, Esquire, Barrister-at-Law. (Gazetted June 8th, 1872.)

LINDSAY HALL, of the Village of Aurora, Esquire, Barrister-at-Law. (Gazetted June 15th, 1872.)

JOHN CRERAR, of the City of Hamilton, Esquire, Barrister-at-Law.

JOHN FRANCIS CAMPBELL HALDAN, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted June 22nd, 1872.)

HENRY ALFRED WARD, of the Town of Port Hope, Esquire, Barrister-at-Law. (Gazetted June 29th, 1872.)

FRANCIS HENRY CHRYSLER and PHILEMON PENNOCK, junior, of the City of Ottawa, Esquires, Barristers-at-Law. (Gazetted July 6th, 1872.)

JOHN HOSKIN, of the City of Toronto, Esquire, Barrister-at-Law, and GEORGE REDMOND, of the Town of Brockville, Gentleman, Attorney-at-Law. (Gazetted June 20th, 1872.)

GEORGE WASHINGTON BADGEROW, of the City of Toronto; VALENTINE McKENZIE, of the Town of Brantford; JAMES O. LOANE, of the Town of Stratford; and G. LEPROY McCAUL, of the Town of Guelph, Esquires, Barristers-at-Law; and IVAN O'BEIRNE, of the Town of Peterborough, Gentleman, Attorney-at-Law, (Gazetted July 27th, 1872.)

JOHN CRICKMORE, of the City of Toronto, and THOMAS GREIG, of the Village of Carleton Place, Esquires, Barristers-at-Law; and FREDERICK WILLIAM MONRO, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted August 3rd, 1872.)

WILLIAM M. MERRITT, of the Town of Guelph, Barrister-at-Law. (Gazetted August 10th, 1872.)

JOHN ARTHUR WELLESLEY HATTON, of the Village of Cayuga, Esquire, Barrister-at-Law. (Gazetted August 17th, 1872.)

ROBERT C. SMYTH, of the Town of Brantford, Esquire, Barrister-at-Law. (Gazetted August 31st, 1872.)

ALFRED PASSMORE POUSSETTE, of the Town of Peterborough, Esquire, Barrister-at-Law; and PETER McGILL BARKER, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted Sept. 21st, 1872.)

HENRY BECHER, of the City of London, and JOHN CAMERON, of the Town of Strathroy, Esquires, Barristers-at-Law. McLEOD STEWART, of the City of Ottawa; and JOHN McFAYDEN, of the Village of Mount Forest, Gentlemen, Attorneys-at-Law. (Gazetted Sept. 28th, 1872.)

JOHN MARTIN, of the City of London, Esquire, Barrister-at-Law. (Gazetted October 5th, 1872.)

JOHN BLEVINS, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted October 12th, 1872.)

ASSOCIATE CORONERS.

THOMAS SWAN, Esquire, M. B., for the County of Waterloo.

DAVID BURNET, Esquire, M. B., for the United Counties of Northumberland and Durham.

JOHN DOUGALD McLEAY, Esquire, M. D., for the County of Middlesex. (Gazetted June 1st, 1872.)

FRANCIS HAMB HOWLAND, Esquire, M.D., for the County of Oxford.

NOBLE BENJAMIN HALL DEAN, Esquire, M.D., for the United Counties of Northumberland and Durham.

WILLIAM O'DELL ROBINSON, Esquire, M.D., for the County of Waterloo. (Gazetted June 15th, 1872.)

GEORGE DAVID LOUGHEED, Esquire, M.D., for the County of Lambton.

MARSHALL MARSELLUS PULASKI DEAN, Esquire, M.D., for the County of Peterborough. (Gazetted June 22nd, 1872.)

LOTHROP PAXTON SMITH, Esquire, for the United Counties of Northumberland and Durham. (Gazetted June 29th, 1872.)

ALEXANDER STEPHENS, Esquire, M.D., for the District of Parry Sound. (Gazetted July 6th, 1872.)

PHILIP HOWARD SPOHN, Esquire, M.D., for the County of Simcoe. (Gazetted July 13th, 1872.)

RICHARD KING, Esquire, M.D., for the United Counties of Northumberland and Durham. (Gazetted July 27th, 1872.)

GEORGE NIEMEIER, Esquire, M.D., for the County of Bruce. (Gazetted August 10th, 1872.)

ROBERT HERBERT HUNT, Esquire, M.D., for the County of Grey. (Gazetted August 17th, 1872.)

CHARLES D. TUFFORD, Esq., M.D., for the County of Middlesex. (Gazetted August 31st, 1872.)

JOHN CHURCH CHAMBERLAIN, Esquire, M.D., for the County of Lennox and Addington. (Gazetted Sept. 14th, 1872.)

Appointments to Office.—Items.

ALGERNON WOOLVERTON, Esquire, M.D., for the County of Wentworth. (Gazetted September 21st, 1872.)

WILLIAM DEWITT CLINTON LAW, Esquire, M.D., for the County of Simcoe. (Gazetted Sept. 21st, 1872.)

WILLIAM B. FOWLER, Esquire, M.D., for the County of Huron. (Gazetted October 5th, 1872.)

GEORGE MILLER AYLSWORTH, Esquire, M.D., for the County of Huron.

BALDWIN LORENZO BRADLEY, Esquire, M.D., for the County of Oxford. (Gazetted October 12th, 1872.)

The Press and the Bar.—Many years ago resolutions were passed by the members of the Oxford and western circuits declaring it to be incompatible with the status of a barrister to report proceedings for the public press. The resolution on the Oxford circuit was aimed at Mr. Cooke Evans, who then represented the *Times*, and on the western circuit at Mr. H. T. Cole (now a Queen's counsel), who then reported for the *Morning Chronicle*. The dictum of the Oxford and western circuits was warmly resented by the press. By way of retaliation the *Times* adopted a plan that was followed by many other journals, and which soon led to the rescinding of the obnoxious resolutions. The leading journal stated that it was of no importance to the general public, however important it might be to the legal gentlemen themselves, to know what particular counsel appeared in any case. Accordingly instructions were given to the *Times* representatives on the Oxford and western circuits to suppress the names of all the barristers who appeared in cases reported in that paper. Hence for some time in the reports of these circuits, the public read that "the counsel for the plaintiff," "the counsel for the defendant," "the counsel for the prosecution," and "the counsel for the prisoner," said or did so and so. This was a serious matter for the bar, and no doubt materially hastened the withdrawal of the objectionable stigma sought to be cast upon the press.—*Gentlemen's Magazine.*

In Connecticut it is proverbially said of a discontented man that he would "grumble if he were going to be hanged." And, indeed, it is remarkable to see how even the slight peril of death involved in a trial for a capital offence by a petit jury rouses all the captiousness in the nature of the man who is the subject. For a long time the counsel for the defence in criminal cases have been dissatisfied with the ordinary juror, and, so far as the case was concerned, yearned for a man whose mind up to the time of his summons to serve had been a virgin blank. Him they have now found, and they have rejected him. In the Stokes case a juror was called, Peter Eckhardt by name, who had drunk deep at the Pierian spring of metaphysics, and was fully aware of the relativity of knowledge. This astute person not only disbelieved whatever he saw in the papers, but he also declared, that "for all he knew Fisk might be alive still, as he had never seen him shot." Upon this confession of unfaith one would suppose that the counsel for defence would have exclaimed that this was the man they had long sought, and mourned because they found him not, and had him sworn in by acclamation as a paragon of petit jurors. But it is painful to record that even Eckhardt did not meet their views, and he was dismissed with an ignominy painfully in contrast with the joy wherewith we have so long been assured he would be greeted. The fates never forgive. It is impossible that we should ever hereafter have a chance of getting so exemplary an idiot as Eckhardt in a panel to try a capital case, and we have missed our only opportunity for observing the procedure and recording the conclusions of the model juror.—*Pittsburg Legal Journal.*

Nisi Prius.—The origin of the term *nisi prius* was rather curious, and illustrates the startling fictions that our fathers delighted to honor. Formerly, in order to send a cause to trial at the assizes, two writs were directed to the sheriff. By the first writ, called a "venire," the sheriff was commanded to cause a jury to come to Westminster. The second writ, called a "distringas," supposed the jurors to have disobeyed the first writ, and commanded the sheriff to distrain their goods, so as to compel them to come to Westminster on a certain day, unless before that day a judge of assize should come to the place where the cause was intended to be tried, as in practice he always did. The words of this writ *nisi prius* gave the name to the ordinary sittings for trying causes. The fiction maintained by these writs was not only useless, but pernicious, for an irregularity in returning them might deprive a plaintiff of the benefit of his verdict. All that was really necessary was, that the sheriff should take care to have in attendance at the assizes a number of jurymen sufficient for the trial of the causes likely to be entered.—*Albany Law Journal.*

The Decisions of Justices.—The unpaid magistracy is the most abused institution of the country. Very likely some of their decisions are wrong; but it is ridiculous to form an opinion from the newspaper reports, because important incidents of the case are omitted. Writers who propose to abolish the "great unpaid" do not take the trouble to consider the subject. The substitution of paid magistrates would be costly if it were possible, but, however willing the public might be to pay the cost, it would be impossible to find the requisite number of men. Besides, the magistrates are fully qualified to discharge their duties, and, with some exceptions, they do so satisfactorily. The abolition of the unpaid magistracy would be a disastrous social revolution. A writer in the *Times* complains that the decisions of justices cannot be reversed unless the justices themselves reserve any question for the Court of Criminal Appeal. What would be the result of giving an unlimited right of appeal? We apprehend that two Courts of Appeal would be fully and constantly occupied in disposing of such appeals. Perhaps in the instance cited by "Stuff-gown," the justices were wrong, but as a rule, when any point is raised, the bench is ready to grant an appeal. Besides, the justices do not sit with closed doors, and their critics in the press are extreme to note the slightest error. We see no danger to the public, and a great convenience, in reserving to the justices the right to refuse an appeal from their decisions.—*Law Journal.*

DIARY FOR DECEMBER.

1. SUN .. *1st Sunday in Advent.*
2. Mon .. Paper Day, Q.B. New Trial Day, C.P.
3. Tues... Paper Day, C.P. New Trial Day, Q.B. Consolidated Statutes came into force 1859.
4. Wed... New Trial Day, C.P. Open Day, Q.B.
5. Thurs. Open Day. Re-hearing Term in Chancery commences.
6. Fri.... New Trial Day, Q.B. Open Day, C.P.
7. Sat.... Michaelmas Term ends. Open Day. Last day for Attorneys to take out Certificates.
8. SUN .. *2nd Sunday in Advent.*
10. Tues .. General Sessions and County Courts sittings in each County.
14. Sat.... Collectors rolls to be returned unless time extended.
15. SUN .. *3rd Sunday in Advent.*
21. Sat.... *St. Thomas.*
22. SUN .. *4th Sunday in Advent.*
23. Mon .. Nomination of Mayors in Towns, Aldermen, Reeves, Councillors and Police Trustees.
25. Wed... *Christmas Day.* Christmas vacation in Chancery begins.
26. Tues .. *St. Stephen.* Upper Canada constituted a Province, 1791.
27. Fri.... *St. John the Evangelist.*
28. Sat.... *Innocents.*
24. SUN .. *1st Sunday after Christmas.*

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THE

Canada Law Journal.

DECEMBER, 1872.

TO OUR READERS.

With this number closes the eighteenth year of our existence. During that period we have sought, and, we think, not in vain, to promote the best interests of the profession; and we have suggested and to the best of our ability promoted various measures of law reform, which have since become law. We have struggled successfully against occasional discouragements, and surmounted many difficulties, financial and otherwise; and can now point to a large subscription list, rapidly increasing, and containing the names of the foremost members of the profession, as the best practical proof that we enjoy the confidence of the large majority of our brethren.

In the year 1865, an alteration was made in the size of the volume; and the *Local Courts' Gazette* was published in connection with the *Law Journal*. This change in many ways worked well; and if the support on which we *at first* mainly relied had continued and increased, it would not now be necessary to allude to this subject. But, from various causes, which it is not at present necessary to discuss, the subscriptions from Division Court and Municipal officers have fallen off. This loss has, on the other hand, been more than counterbalanced by a large additional support from the legal fraternity, especially during the last year. This is owing, doubtless, to the increased number of the profession, and the greater demand for information on subjects of legal interest, coupled with the efforts we have made to meet this demand.

The result of all this is that we have decided to discontinue the *Local Courts' Gazette*, and devote our energies to making the *Canada Law Journal* more acceptable and useful than ever to practitioners in Ontario and the sister Provinces.

With this in view we have made arrangements, (1) To obtain further assistance in the editorial departments; (2) To increase the size of the volume by adding a number of additional pages; (3) To improve its appearance

by the use of new type and more expensive paper.

This will of course involve a large additional outlay both in printing and paper, and in the necessary supply of matter. Partly from this cause and partly from the increased cost of production and management, we shall be compelled to do as the public press in the country has done, and increase our prices both for subscriptions and advertisements. From and after the 1st January next the annual subscription will be $5 00. The prices of advertising will be found stated in another place.

We have only space to notice briefly, with much regret, the fact that Mr. J. A. Boyd has resigned the office of Master in Chancery. Mr. Taylor, Referee in Chambers, succeeds him; and Mr. George S. Holmested has been appointed in the place of Mr. Taylor. The appointments are good ones, and satisfactory to practitioners. We are obliged to withhold further observations until next month.

We devote some space in this number to a reprint, from the Queen's Bench Reports, of the Brockville election case, decided under the Controverted Elections Act of 1871. We do this for the purpose of making our series complete, all the other cases deciding points of importance under this Act having already been reported by us, or being in course of preparation for publication in our columns. We also give a synopsis of the Monck election case, taken from the same Reports. All the decisions of our courts or judges on this important subject can, therefore, be ascertained by reference to our pages, and nowhere else.

Sir James Hannen, formerly one of the judges of the Queen's Bench, has been appointed Judge-Ordinary of the Probate and Divorce Courts, in the room of Lord Penzance. The English *Law Journal* highly commends the appointment. It says: "We know of no judicial office in which a moralist, an egotist, or a bigot could work so much mischief as in the office of judge of the Divorce Court, and we believe Sir James Hannen to be singularly free from the faults which characterise those three classes of men. He has to be weighed in the scale as against two such men as Sir Cresswell Cresswell and Lord Penzance, but we believe that he will not be found wanting, because he is endowed with the qualifications which rendered them successful."

The English correspondent of the *Albany Law Journal* waxes enthusiastic over the fact that he has discovered (apparently by evolution from the depths of his inner consciousness) the origin of the word "moot," after looking in vain for it "through the archives of the Inns of Court libraries." Any common English dictionary, say *The Imperial*, would have disclosed to him what he is at so much pains to elaborate. The word is a modification of the Anglo-Saxon "*mote*," probably by a simple euphonic change, such as we find in "Coke" and "Cook." It means originally "a meeting," and so by easy transition, "a contention." The expression "moot-court," which the correspondent says is a "blunder of the Frenchified Normans"(!) and should be only *moot* or *mote*, is just as correct as the phrase "moot-question" "moot-point," and others of like formation. "To hold a moot-court" is an expression which carries us back to the exercises in pleading mock causes, which were once practised in the Inns of Court.

The English *Law Journal* is in favour of the extension of the equitable doctrine of "undue influence" to cases of testamentary disposition of property, in the same way and to the same extent as it obtains in gifts *inter vivos*. It lays down—and we think with great good sense—that when the relation between the testator and the legatee is that of doctor and patient, or priest and penitent, then if the bequest is disputed, the burden of proof should be cast upon the recipient of the gift. As the law now stands, the *onus* is the other way—upon the person who calls the will in question. But, as the *Law Journal* puts it, there is no hardship in calling upon the legatee to explain the precise character of the influence which he brought to bear upon the testator. Then, when he had cleared himself of any imputation of undue influence, the burden of proof would be shifted to the person attacking the will.

THE NEW VICE-CHANCELLOR.

Whilst discussing recently the probable successor of Mr. Mowat, we expressed a hope that the appointment might be made without delay, and that political considerations might not influence the selection. The seat has been filled with promptitude, and by the choice of a gentleman opposed in politics to the Dominion Government.

Whilst admitting that the appointment of Mr. S. H. Blake was to us, as we believe to a large number in the profession, somewhat a matter of surprise, we are bound to say that the feeling did not arise in the least from any doubt as to his capacity for the office. It was rather that it was thought that some older member of the Bar, having at least equal claims, would have been appointed; and, on the other hand, that Mr. Blake would scarcely resign his lucrative practice at his time of life, for the hard work and bad pay of a Vice-Chancellorship.

But though young in years, Mr. Blake has had, during all the time he has been in practice, the management of a very large business; and upon him has devolved, to a great extent, the immense counsel business of his talented brother, which the latter handed over to him when he withdrew for a time from the active pursuit of the profession of which he is so great an ornament. It is a sign of no inconsiderable ability that he has been able, in a great measure, even for a time, to take his brother's place; therefore, judging of the future from the past, though success at the Bar does not necessarily imply a fitness for a judicial position, we can give the appointing power credit for having made a good selection from the Equity Bar.

Mr. Blake was called to the Bar in Hilary Term, 1860. On the 16th March last, he was given a silk gown by the Lieutenant-Governor of Ontario, at the same time as Dr. McMichael, Wm. Proudfoot, C. S. Patterson, E. B. Wood, John T. Anderson and Thos. Moss received the like distinction. The legality of this action on the part of the Local Government was called in question at the time, and we are free to confess that the arguments against it seemed to us unanswerable.

In his private capacity Mr. Blake bears an irreproachable character, and his liberality in religious and charitable undertakings is well known.

On Wednesday, the 11th inst., the new Vice-Chancellor was installed and took his seat on the Bench, after receiving the congratulations of the Chancellor and the senior Vice-Chancellor.

PROCEEDINGS IN CONVOCATION LAST TERM.

Much important business was done during the present Term. The usual *resumé* will be given next month. We can at present only refer shortly to matters of pressing interest.

Under recent regulations, articled clerks will be required to pass a preliminary examination as well as students. Notice is to be given by a Bencher in one Term for the next Term, but notice for the next February examination may be given by the 1st January next. Of this let those desiring to become articled clerks take due notice; for it is also provided that service under articles will only count from time of passing. The fees required will be one dollar with the notice, and forty dollars on presentation for examination.

Rules were also adopted for the establishment of a Law School. These will be published at length hereafter. Mr. Alex. Leith was elected President of the School and Lecturer on Real Property, at a salary of $1,000 per annum. The other lecturers appointed were: Mr. J. Bethune, on General Jurisprudence; Mr. Z. A. Lash, on Commercial and Criminal Law; and Mr. Charles Moss, on Equity, at salaries of $800 each.

Mr. Vankoughnet having resigned the office of Reporter of the Common Pleas, which he held under the old arrangement, Mr. George F. Harman was appointed in his place.

JUDGES RETURNING TO THE BAR.

In view of the resignation of the late Vice-Chancellor Mowat, and his acceptance of the office of Attorney-General for the Province of Ontario, which involves his return to the Bar, a good deal of attention has been directed to what the lay press has called "this unprecedented act." We give below, as promised in our last number, the examples which we have recollected or discovered, of Judges of the Superior Courts returning to practice.

By the aid of Mr. Foss's valuable volumes, one is able to make out a tolerably correct list of all such changes as have taken place at the

English Bar. Instances of the kind were common during the troublous times of Charles I., the Commonwealth, Charles II., James II., and William III. Since then no example has occurred in English History, though there is a very noticeable one in Scotland, to which we shall advert.

The earliest example is that of Sir Robert Heath, who was made Chief Justice of the Common Pleas by Charles I. in 1631. Three years afterwards he was discharged from his office, apparently without reason, and next term he took his place at the Bar as junior serjeant: *Cro. Car.* 375. He continued in practice till the same monarch restored him to the Bench in 1641. His memory is to be freed from the charges of "bribery and corruption," which at one time were made against him. One of his own rules of conduct is memorable: "to do justice for justice' sake, to do *justum juste;* for it is very hard for an ill man to be a good judge."

Prideaux and Browne, who were Lords Commissioners of the Great Seal, appointed by the Commons in 1648, were removed in 1646, and the custody of the Seal transferred to the Speakers of the Houses. Both of them thereupon resumed practice at the Bar. Next in chronological order is the great name of Sir Matthew Hale. He was upon the Bench in 1658, but at the death of Cromwell refused a new commission from his son Richard. Thereafter the better opinion appears to be that he practised till the Restoration, when he was made Chief Baron of the Exchequer.

We may next group a list of comparatively or positively insignificant Judges, who, having been appointed to office by the Parliament or by Cromwell, forfeited their judicial position on the accession of Charles II. to the throne. These Judges were Fountaine (Commissioner of the Great Seal), Glynne, Newdigate, Parker, Widdrington, Archer and Wyndham. These, at the Restoration, all returned to the Bar. Of these Archer was replaced on the Bench in 1663, and Wyndham in 1670.

Next comes the memorable name of Pemberton. He was first appointed Judge of the King's Bench by Charles II. in 1679, but was dismissed from office in less than a year, owing, it is said, to the intrigues of Scroggs, C. J. He at once returned to practice, and in about a year he was selected to supersede Scroggs in the Chief Justiceship. He was afterwards, at his own request, transferred to the head of the Common Pleas; but in 1683 the King, apparently for political reasons, dismissed him from this Court. Upon this he returned to the Bar a second time, where he continued in practice for fourteen years, till his death. The judgment of posterity upon this versatile judge may be expressed in the language of Macaulay (which Mr. Foss cites approvingly): that his memory is to be regarded with that respect which always accompanies moderation and independence.

In the time of James II. we have first Robert Atkyns. He was appointed Judge in 1672; but in 1680, being out of favour with the Government, he was either dismissed or he resigned. Afterwards he practised in the Courts till he was made Chief Baron by William III. in 1689. In 1687, Wythens, who had been appointed Judge of the King's Bench by Charles II., and continued in office by James II., was discharged because he had gone against the King's wishes. The very next day, it is told, he came to Westminster Hall and practised as a serjeant with immense popularity. About the same time (or rather in 1686) the Judge, Sir Creswell Levinz, so well known from his Reports, suddenly received a *supersedeas* from James II.; "whereto," in his own language, "he humbly submitted." He at once went back to the Bar, and continued in large and remunerative practice till his death in 1696.

We may now again form another group of Judges who forfeited their position at the Revolution. These were Lutwyche, Rotherham, Ingleby, and Jenner. Lutwyche not only returned to the Bar, but commenced a series of Reports, which have preserved his name from oblivion. The others also returned to the Bar, but none were ever replaced upon the Bench.

The last names of English Judges we have to mention are those of Anthony Keck and George Hutchins. They were both Commissioners of the Great Seal under William III. The former was discharged in 1690, and the latter in 1693, and both recommenced practice thereafter.

The one instance in Scotch history which we have been able to verify of a Judge returning to practice, is in the case of the Hon. James Erskine of Grange, brother of the Earl of Mar. He was in the high position

of Lord Justice Clerk in Scotland prior to 1784. Walpole, in that year, introduced the statute (7 Geo. II. c. 19) which incapacitated Judges from being members of Parliament, with the view, it was said, of fixing Lord Grange to his judicial duties. When that became law, the exasperated Judge resigned his dignities and entered Parliament in order to oppose Walpole's Government. Obtaining small success in this direction, he returned to practice at the Bar, and without obtaining further preferment died in London in 1754, in the 75th year of his age.

It will be seen that all these were cases of constrained or enforced abandonment of office, during the period when the duration of the Judge's office was *durante bene placito*, and was terminated by the demise of the Crown,—with the exception of the last, in which we have a voluntary resignation on the part of the Lord Justice Clerk, at a time when the Judges held office *quamdiu se bene gesserint*.

We know of no other examples in any of the Courts of Great Britain or her dependencies, and we do not propose to cite any instances from the Courts of the adjoining Republic.

SELECTIONS.

MR. JUSTICE ARCHIBALD.

Mr Archibald, of the Home Circuit, who has been appointed by Lord Selbourne to succeed Sir James Hannen as a judge in the Queen's Bench, is the second surviving son of the late Honourable S. G. W. Archibald, Master of the Rolls, and judge of the Vice-Admiralty Court of Nova Scotia, who was previously for nearly twenty years Speaker of the House of Assembly there, and whose name is to this day held in affectionate memory throughout the province. His elder brother is the present able Consul-General at New York, Edward Mortimer Archibald, Esq., C. B., whose services have frequently called forth the marked approval of the authorities at the Foreign Office, as well as the good will of the citizens of the United States.

Mr. Archibald was called to the bar by the Society of the Middle Temple in 1852, after having practised for nearly eight years as a special pleader. He joined the Nothern Circuit immediately after his call, but in 1858 he changed to the Home, of which he has continued to be a member up to the present time. In February, 1868, he was appointed by Sir John Karslake, then Attorney-General, to succeed Mr. Justice Hennen as junior counsel to the Treasury, the duties of which important and responsible office he has, for nearly five years, discharged with very great ability and distinction. During his career at the bar, Mr. Archibald has enjoyed a very varied and extensive practice, and has been engaged in very many important cases. We may mention, among others, the great Shrewsbury case, where he was junior for the claimant (the junior opposed to him being Mr. Hannen, whom he now succeeds); the case of *Tapling v. Jones*, in the House of Lords; the Fenian and Bribery Prosecutions; the Dundonald and Wicklow Peerage cases; besides Colonial, Indian, and Patent cases in the Privy Council, and nearly all the great Ecclesiastical appeals of recent years. A most useful reform, which has been productive of great relief to suitors against the Crown—we mean the Petitions of Right Act—ably carried through Parliament by the present Lord Chief Justice Bovill, was, we believe, suggested and drawn by Mr. Archibald. We may add that Mr. Archibald, like Mr. Justice Denman, has been connected with the *Law Journal* Reports: Mr. Archibald having done one of our Digests, and Mr. Justice Denman having been a reporter on the staff of the *Law Journal* Reports in the Court of Queen's Bench.—*Law Journal.*

ONTARIO REPORTS.

QUEEN'S BENCH.

(*Reported by* Chris. Robinson, *Esq., Barrister-at-Law.*)

In re the Election for the Town of Brockville and Township of Elizabethtown.

Controverted Election — Corrupt Practices — "Illegal and Prohibited Acts in reference to Elections"—Selling and giving Liquor — Carriage of Voters — Right to reserve questions of law—32 Vict., ch. 21, 34 Vict., ch. 3.

Upon questions reserved by the rota Judge under "The Controverted Elections Act of 1871," it appeared that H. and B. voted for Respondent. H. kept a saloon, which was closed on the polling day, but upstairs, in his private residence, he gave beer and whiskey without charge to several of his friends, among whom were friends of both candidates. B., who had no license to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; and the candidate did not know of or sanction their proceedings.

Held, (though with some doubt as to B.) that neither H. nor B. had committed any corrupt practice within sec. 47 of 34 Vict., ch. 3, and therefore had not forfeited their votes; for they had not been guilty of bribery or undue influence, and their acts, if illegal and prohibited, were not done "in reference to" the election, which, under sec. 47 of 34 Vict., ch. 3, is requisite in order to avoid a vote.

The words "illegal and prohibited acts in reference to elections," used in sec. 3, mean such acts done in connection with, or to affect, or in reference to elections; not all acts which are illegal and prohibited under the election law.

The right to vote is not to be taken away or the vote forfeited by the act of the voter unless under a plain and express enactment, for it is a matter in which others beside the voter are interested.

One M., a carter, who voted for Respondent, at the request of P., the Respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election, P. gave M. $2, intending it as compensation

for such carriage, but M. thought it was in payment for work which he had done for P. as carter. The candidate knew nothing of the matter.

Held, that there was properly no payment by P. to M, for any purpose, the money being given for one purpose and received for another; but that if there had been it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay, to which it could relate back.

If such payment had been established as a corrupt practice, it would have avoided P.'s vote, but not M.'s; and it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary.

Quære, whether, under 34 Vict., ch. 3, sec. 20, the Judge has power, before the close of the case, to reserve questions for the Court.

This was a case stated under the Controverted Elections Act of 1871, as follows:—

CASE.

IN THE QUEEN'S BENCH.

Controverted Elections Act of 1871.

Election for the town of Brockville, with the Township of Elizabethtown thereto attached, holden on the fourteenth and twenty-first days of March, A.D. 1871.

Court for the trial of an Election Petition for the town of Brockville, with the Township of Elizabethtown thereto attached, between Samuel Flint, *Petitioner*, and William Fitzsimmons, *Respondent*.

At the above court, holden on the 26th, 27th, 28th, 29th, and 30th days of June, and on the 5th and 6th days of July, A.D. 1871, before me, the Honourable John Hawkins Hagarty, Chief Justice of the Court of Common Pleas, and one of the judges on the rota for the trial of election petitions, the above-named petitioner charged by his petition that the said respondent was not duly elected or returned, and that the said election was void, by reason that the said respondent and his agents, with a view of promoting the election of the said respondent, caused certain hotels, taverns, and shops, in which spirituous or fermented liquor or drinks were, at the time of the said election, ordinarily sold, to be opened and kept open on the day of polling votes at said election, in the wards and municipalities in which said polls were held, and caused spirituous and fermented liquors and drinks to be sold and given to divers persons within the limits of the said town of Brockville and the township of Elizabethtown during the day of polling votes at the said election; and hired certain horses and vehicles, and promised to pay for certain other horses and vehicles, and did pay for the same, to convey voters to, or near, or from the polls or polling places, or the neighbourhood thereof, at the said election; and also by reason that divers persons who were guilty of the above practices voted at the said election for the said respondent. And the said petitioner by the said petition prayed the said seat, or a scrutiny, and that on such scrutiny the votes of the said persons who were guilty of the above corrupt practices should be struck off the poll.

Upon consideration of the evidence adduced on behalf of the petitioner as to the said charges, I find as follows:—

1. As to George Houston. I find that George Houston, one of respondent's voters, was a saloon-keeper in Brockville: that on the polling day his saloon was closed and locked: that up stairs, in a room in his private residence, he had beer and whiskey on a table: that many of his friends, perhaps to the number of twenty to thirty, were that day, at different times, up in this room, and had liquor: that no pay was taken or expected, nor any charge made for this: he told any of his friends who were in the habit of coming to his saloon that they could have a drink up stairs: that friends of both candidates were there on his invitation, and some not voters: that he was under the impression that so giving this liquor was not violating the law: that this was not done to influence any vote or voter by means of liquor: that it was not done in the interest of either candidate, nor to produce any effect in the election or its result: and that the respondent did not know of or sanction these proceedings.

2. As to Samuel Burns. I find that Samuel Burns had no license to sell liquors: that he voted for respondent: that he sold liquor to all persons that asked and paid for it on the polling day, at a place near one of the polls in the township: that he sold to persons, voters and others, without reference to their side or politics: that this was not done in the interest of either candidate, or to affect the election or its result, but simply for the sake of gain; and that the respondent did not know of or sanction these proceedings.

3. As to the charge of conveying voters to poll. I find that William McKay, a carter in Brockville, and a voter for respondent, did, at the request of Thomas Price, an agent of respondent, carry an old man named Paul, a voter for respondent, a distance of five or six miles to the polling place: that McKay was aware on the polling day that it was illegal to carry voters for hire, and had expressed his willingness to carry voluntarily and free of charge, being anxious to help the respondent: that when Paul was spoken of, Price asked McKay could he McKay, not carry him to the poll, and McKay said he would do so without charge, and that no hiring or payment was then contemplated between them: that some days after the election Price gave McKay $2, considering that McKay was a poor man, and that he ought to give him something, and paid him the money intending it as a compensation for so carrying the voter: that McKay did not receive it as such, but received it thinking it was in payment for some work he had done for Price as a carter in his ordinary business, and that there was an account between them for work in or about the amount of that sum: that when the $2 were paid, nothing was said about carrying the voter: that the respondent knew nothing of this matter, and never authorized or sanctioned it.

The opinion of the Court of Queen's Bench is requested:

1st. What is the legal effect of the payment by Price, an agent for respondent, to McKay, as found by me: whether it was a "corrupt practice," and, if so, did it avoid the vote of Price or McKay, or of both, as voters for respondent, or does it avoid the respondent's election?

2nd. Whether the giving or selling of liquors, as found by me, in such cases as Houston or

Burns, avoided the votes of the said persons, or either of them?

(Signed) John H. Hagarty, C.J., C.P.

In this Term, *Bethune* appeared for the petitioner. The question as to the votes of Houston and Burns, arises under the Ontario Act 32 Vict., ch. 21, sec. 66, which requires all hotels, taverns, and shops in which liquors are ordinarily sold, to be closed during the polling day, and forbids any liquor to be sold or given to any person within the municipality during such period, under a penalty of $100. The amending Act, 34 Vict., ch. 8, had two objects—to change the mode of trial, and more effectually to prevent corrupt practices at elections. In it, by sec. 3, a definition of corrupt practices is for the first time given, and it could hardly have been more comprehensive. It includes all "illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of the Legislature." The acts of both of them were clearly prohibited, and contrary to the statute, and were therefore corrupt practices: 1 *O'Malley* and *Hardcastle*, 184. Their votes are both bad, therefore, under sec. 47 of 34 Vict., which declares that any corrupt practice committed by an elector voting at an election shall avoid his vote. There is no clause expressly against "treating," as in the English Act, where it is provided for specially. Secs. 61 and 66 of our Act, 32 Vict., ch. 21, provide against it in effect, and are very stringent, making no exceptions even for medical purposes, though perhaps that might be implied. No question as to intention can arise under sec. 66, as under secs. 61, 63, 67, nor as to agency, as under sec. 71.

As to Price's conduct, the 34 Vict., ch. 8, sec. 47 avoids his vote. His act was one of agency on behalf of the respondent. The intent of the agent is of no consequence; and the principal is affected by his act, although the agent was not employed for the purpose in which he violated the Act: 1 *O'Malley* and *Hardcastle*, 107, 184, 201. His act was an offence against sec. 71. The payment he made after the election was intended as compensation for carrying the voter, and although the agency had terminated, yet such payment, being connected with the precedent act of the agent, related back to the time when the service was performed, by analogy to the doctrine of ratification: 1 *O'Malley* and *Hardcastle*, 261.

The statute, under the Interpretation Act, 31 Vict., ch. 1, sec. 7, sub-sec. 39, should be liberally construed, so as best to ensure the attainment of its object. Votes are given on certain conditions, which must be observed. [Wilson, J.—Is that so? Is it not rather a right, of which the se provisions are merely safeguards?] If a pr ohibited act be done by a candidate, it avoids the election; if it be done by a voter, it avoids h*is* vote; if done by another, it subjects the person to a penalty.

J. H. Cameron, Q.C., contra. It is not pretended the election can be avoided excepting by reason of the payment by Price. As to the matters relating to Houston and Burns: the acts prohibited by sec. 66, before referred to, are not necessarily connected with elections at all. Hotels, &c., are required to be closed during the polling day, and no liquor is to be sold or given that day under a penalty. The election may be over early in the day; but at whatever hour the poll is closed, the hotels, &c., must be kept closed the whole of that day, from the earliest hour in the morning till midnight. The illegal or prohibited act, to be a "corrupt practice," and to avoid a vote, must be an illegal or prohibited act "in reference to elections," which these acts were not. The heading of "Prevention of Corrupt Practices at Elections," before sec. 67, cannot be held to govern all the sections down to 74; for sec. 72 defines what shall be deemed to be "undue influence." There is no necessity to hold any act to be a *corrupt practice* unless it be expressly declared to be so, because all prohibited acts have some penalty or other attached to them. Houston and Burns may be subject to a penalty under sec. 66; but their votes are good, and cannot be disallowed.

As to Price's case. Agency, if established at the time he employed the team, must be shown to have continued up to the time when he paid the money. There was no proof of hiring under 32 Vict., ch. 21, sec. 71; and the act of payment was a voluntary act of Price after the election was over, made not on account of the service rendered, but from charity, and not for the candidate, but for himself, and in his business. There was no agency existing then. A *payment* must be the act and intent of both; such intent was absent from the minds of both, but if absent from the mind of one, that is sufficient to make it no payment. Price's act, if within sec. 71, merely destroys his vote, and subjects him to a penalty; it does not defeat the election. Nothing will avoid the election unless under the 46th sec. of 34 Vict., ch. 8, a corrupt practice be reported by the judge to have been committed by or with the knowledge and consent of the candidate. An election committee has much greater power in this respect under ch. 21, sec. 69. The argument may be thus shortly restated:—1. Price was not an agent at the time of the payment. 2. If he were, the payment was not with the knowledge and consent of the candidate. The election, therefore, cannot be avoided. 3. Price did not *hire* any team; his vote, therefore, cannot be struck off. Houston's and Burns's votes are good; at most their acts were prohibited, and they may be subject to a penalty. Where the Legislature have declared that a vote shall be lost for a particular cause, it does not intend th:t it shall be forfeited for any other cause.

Bethune, in reply. Selling or giving liquor does avoid the votes. As to what is undue influence, see *Huguenin* v. *Baseley*, 14 Ves, 272, and in 2 *White* and *Tudor*, L. C. 504, 3rd ed. It differs in its nature from an illegal or prohibited act. If the 47th section is not more extensive than the law was before, it is of no value.

Entertainment, it is not said shall avoid the election; but it does so because it is a prohibited act. The 43rd section of the Imperial Act, is the one which has not been adopted in our Act. As to Price's act, it avoids the whole election; but at any rate his vote is avoided by the 71st section. Most of the payments in such cases are made after the election. He referred to the cases already decided under this Act.

The *Glengarry Case*, before Hagarty, C. J.; *North York Case*, before Galt, J.; *Simcoe Case*, before Strong, V.C., and the *South Grey Case*, before Mowat, V. C.; 8 C. L. J. N.S.; and see *East Toronto case*, 8 C. L. J. N.S. 115.

Wilson, J.—The particular cases referred to us by the learned Chief Justice of the Common Pleas, are—1stly, that of George Houston. He voted for respondent: was a saloon keeper in Brockville. On the polling day his saloon was closed and locked Upstairs, in a room in his private residence, he had beer and whiskey on a table. He gave it to those who came without pay or expectation of it. It was not done in the interest of either candidate, nor to influence any vote or voter, nor to produce any effect on the election; nor did the respondent know of or sanction it.

2ndly. That of Samuel Burns. He had no license to sell liquors. He voted for respondent. He sold liquor on the polling day, near a poll in one of the townships, and charged for it. He sold it to persons without reference to their side or politics. In other respects, his case is similar to that of Houston.

These two cases may, therefore, be considered together.

The part of the 32 Vict., ch. 21, sec. 66, which applies to these cases, is the latter part of it: "And no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period," (*i.e.* during the day appointed for polling) "under a penalty of $100 in every such case."

And it was argued that because they had infringed the provisions of this section, the one by *giving* and the other by *selling* liquor, they had not only incurred a penalty, but had forfeited their votes: that such giving and selling were prohibited acts, and were within the provisions as to corrupt practices.

The deprivation of the right to vote, or the forfeiture of a vote already given, is not to be imposed as a penalty upon any one, unless under the express enactment of the legislature. There are other persons interested in and affected by that vote beside the voter. The candidate for whom he has voted is interested in it, and so are the whole body of electors who have voted for the same candidate. One vote has and may again influence or change the result of an election, and that is not to be brought about by merely inferential or argumentative legislation, or as to what the Legislature must have intended. There must be a plain enactment declaring that the vote shall be rejected if tendered, or shall be struck off if given, to justify the disallowance of it, and, as a consequence, to double the penalty on the voter, and so seriously to affect the rights, privileges and interests of others dependent on the vote.

What then has the statute said on this point?

32 Vict., ch. 21, sec. 70, declares that on its being proved before any election committee that any elector voting was *bribed*, his vote shall be null and void.

What *bribery* is under that Act, is explained by sections 67 and 68; the acts stated are not acts of bribery; the first of these sections has the caption of "Prevention of Corrupt Practices at Elections."

The 84 Vict., ch. 3, sec. 3, declares that "'corrupt practices' or 'corrupt practice,' shall mean bribery and undue influence, and illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of the Legislature."

The 47th section enacts that, "If on the trial of any election petition, it is proved that any corrupt practice has been committed by any elector voting at the election, his vote shall be null and void." It is under this section that the votes of Houston and Burns are said to be void. It is said they have each been guilty of a *corrupt practice*, not by reason of having committed bribery, but by reason of their having exercised undue influence, or from their having done illegal and prohibited acts, in consequence of the one having given liquor, and the other having sold it on the polling day.

It is quite plain that undue influence and illegal and prohibited acts in reference to elections must be corrupt practices when the Legislature has declared they shall be so.

Firstly. Were the giving and selling of liquor acts of *undue influence?* The meaning of that term is explained and defined by the 32 Vict., ch. 21, sec. 72, and it is quite manifest that the acts charged against Houston and Burns are not within that category.

Secondly. Were the giving and selling of liquor, as before stated, "illegal and prohibited acts in reference to elections?"

It is necessary to settle what the meaning is of "illegal and prohibited acts in relation to elections." Does the expression mean generally all illegal and prohibited acts *under the election law;* or does it mean illegal and prohibited acts when and because they are done in connection with, or to affect, or in reference to, elections?

In the one case, giving and selling liquor, however disconnected with the election they may be, will, if done within the municipality during the election, be illegal and prohibited acts, and as a consequence will be corrupt practices.

In the other case, such acts will not constitute corrupt practices, unless they are shown to have been done to influence or to affect the election, or in some way to have been done in connection with it.

The section in which the illegal and prohibited acts in relation to elections are named, contains the election law offences of bribery and undue influence, both of which acts have and must necessarily have a direct and inseparable relation to the actual electoral contest, and to the proceedings anterior to it. Bribery and undue influence in general are not prohibited, but bribery and undue influence in relation to elections only. Why then should any greater effect be given to the other words of the section, "and all illegal and prohibited acts," and more especially as the words "in reference to elections," have been superadded?

It will be found also that the offences of entertaining electors, furnishing colors or badges, and carrying or wearing them, relate in like manner to the elections.

The election law morality is very different from what morality is under the general law.

The election law does not prohibit stealing, but it does prohibit the wearing of a party badge within the electoral division on the day of election or polling, or within eight days before such day, or during the continuance of the election. The thief may have on his person at the time he votes the watch of the returning officer, or of the candidate whom he supports, but he is an innocent man by the election law, and a good voter; while the elector who has worn a party badge but for five minutes anywhere in the electoral division, miles away from the polling place, within eight days before the election, is a criminal by the election law, and an illegal voter, although in fact a very honest respectable man. The vote of the one, though not his person, will stand the strictest scrutiny. The vote of the other must fail. The thief has been guilty of no corrupt practice, but the wearer of the badge has. This cannot then be a law to *be enforced, unless the enactment* be a plain and positive one.

I do not think we should call every illegal and prohibited act by this special statute, which is intended to operate for a limited time, on a peculiar occasion, and for a particular purpose, a *corrupt practice*, against the provisions of that law, unless the act be shown to have been done in some way or other with a view to the election, or to bear upon it, or as connected with it, or in relation to it, or as calculated or intended so to operate. If any other construction be given to the statute, it will be attended with very oppressive and needless consequences of punishment and forfeiture.

A general state of drinking and drunkenness at the time of the election among the electors and inhabitants of the locality, resulting from the dispensation of liquor, might well be deemed to be a dispensation of such liquor in relation to the election, although it were made without any special reference to the election. The state of mind, the influence and general condition of things it would induce, would tend naturally to disorder the proceedings, and to cause an untrue and improper expression to be given of the sober popular will. That was the case in *O'Malley* and *Hardcastle*, 85.

But the giving or selling of liquor in consequence of a horse trade, or in payment of an old bet, or from mere friendship, or to test the quality of it as a medicine, or to be shipped abroad, or for any other purpose not "in reference to the election," would not, in my opinion, be an illegal or prohibited act, so as to be a corrupt practice within the meaning of the statute. Nor do I think the giving or selling of liquor, though on the polling day, but after the poll was closed, and miles away from where the poll was held, would necessarily be an illegal and prohibited act in reference to the election, so as to amount to a corrupt practice: *Coventry Election Petition*, 20 L. T. N. S. 405.

The 61st section of the 32 Vict., ch. 21, permits the candidate and others acting for him, even with intent to promote his election, to furnish entertainment to the electors, so long as it is done at the usual place of residence of the candidate, or of those who furnish it for him. Such *entertainment*, it would be difficult to say, should not include even a single glass of wine.

The statutes contain many illegal and prohibitory acts besides the giving and selling of liquor on the day of the poll, and to hold them to be corrupt practices, although *not* done in reference to the election, would be hurtful to all parties, and utterly unreasonable.

By 32 Vict., ch. 21, sec. 57, sub-sec. 3, any person disturbing the peace and good order may be imprisoned by the returning officer or his deputy, for a time not later than the final closing of the poll. Is the vote of that person to be rejected, or afterwards struck off, although his act had no reference to the election, but was occasioned by some great wrong done or provocation given to him?

By sec. 60 every person convicted of a battery committed during any part of the election or polling day, within two miles of the place of election or poll, is to forfeit $50. Is that person also to forfeit his vote, although the battery had nothing whatever to do with the election, or happened after the election was over?

It appears to me these cases plainly answer themselves, and enable the matter with respect to the giving and selling of liquor to be as easily answered.

The penalties are already quite severe enough, without increasing them against the voter, and extending them to the candidate, and to the other electors of the constituency, who suffer as well as the voter by the disallowance of his vote, unless we are obliged by the most explicit enactment of the law to do so.

In my opinion, on the case stated with respect to these persons, we are not required, and would not be justified, in avoiding their votes.

The facts show that the giving and selling of the liquor were not acts done in reference to the election.

On this point, I may however say that I am more satisfied with my conclusion as to the act of Houston, as to the giving of the liquor, than I am with respect to Burns, who sold the liquor in a place and under circumstances giving rise to some degree of suspicion.

The other part of the case relates to the act of Price.

His conduct is complained of on the ground of its having been an illegal and prohibited act in reference to the election, contrary to the 32 Vict., ch. 21, sec. 71. That section declares, so far as is applicable here, "that the hiring or promising to pay, or paying for, any horse," &c., "by any candidate, or by any person on his behalf," to convey voters at any election, shall be an illegal act, and the person offending shall incur a penalty of $100; and any elector who shall hire any horse, &c., for any candidate or for any agent of a candidate, for the purpose of conveying electors, &c., "shall *ipso facto* be disqualified from voting at such election, and for every such offence shall incur a penalty of $100."

The section, it will be observed, is in two parts. The first part affects the candidate and his agent, by subjecting them to a penalty. The second part affects the electors, and besides subjecting them to a penalty it disqualifies them from voting.

Price was an agent of the candidate, and so, as to the penalty, is within the operation of the

first branch; but he was also an elector, and so he is within the operation of the second branch, as to the loss of his right to vote.

The case finds there was no hiring of McKay to carry Paul, the voter. McKay carried Paul at Price's request, but he carried him "voluntarily and free of charge." Some days after the election, Price, as compensation to McKay, gave him $2 for carrying the voter. McKay did not receive it as compensation, but in payment of work he had done for Price in his ordinary business as a carter

I do not see how McKay can be within the operation of the section at all. The hiring, or promising to pay, or paying for any horse, &c., applies to the candidate, and to any person on his behalf. That will extend to Price if he hired, or promised to pay, or paid McKay for any horse, &c.; but it cannot extend to McKay, as he was at most the person hired, promised to be paid, or paid. Nor does the second branch apply to him, for that extends to the electors who hire others, and not to those who are hired.

The case has to be considered, then, with regard to Price alone.

At the time he voted—for I assume he did vote, as I gather so from the first question put in the case, and from the argument of counsel, though the case itself does not say he did,—he was under no disqualification; for he had not hired, promised to pay, or paid McKay, and there was no agreement or understanding to do so, but the contrary; the service was to be, as in fact it was at the time performed by McKay, free of charge.

In my opinion, the agency of Price terminated with the election,—the occasion and the purpose for which he was employed. His subsequent payment was an unauthorized act as to his principal. It can relate back to nothing, for there was no hiring or promise to which it could attach. But as a fact it was not a payment; that must be the act and by the assent of both parties. When Price gave the money for one purpose, and McKay received it on another account, and in respect of a different transaction, that was not a payment for the purpose that Price intended it for, more than it was a payment on the account for which McKay received it. It was properly not a payment to or for either one purpose or the other: *Thomas* v. *Cross*, 7 Ex. 728.

In no view of the case, as the learned Chief Justice has found that the respondent knew nothing of the matter between Price and McKay, and never authorized or sanctioned it, could it be possible to avoid the election, even if Price's act had been determined to be a corrupt practice. For under the 46th section of the 34 Vict., ch. 3, the learned Chief Justice, to affect the return, would have to find that "the corrupt practice had been committed by or with the knowledge and consent of the candidate," whereas he has distinctly negatived that fact.

I am not quite satisfied, as I stated during the argument, however convenient the practice may be, and however desirable it is that the law should be so, that the rota Judge has power, until he is in a position to grant his certificate, under the 34 Vict., ch. 3, sec. 20—that is, until the close of the case—to reserve a question for the Court.

Such question is to be reserved "in like manner as questions are usually reserved by a Judge on a trial at Nisi Prius," and no Judge at Nisi Prius can stop a case in the middle, and adjourn it until he has some intermediate difficulty cleared out of his way by a reference to the Court. If there be any doubt in this respect, the Act should be amended.

Assuming that the case is regularly before us, I shall answer the questions submitted as follows:—

1. That there was no *payment* made by Price to McKay. If it were a payment, it was made by Price at a time when he was not an agent for the respondent, and with respect to a matter to which it could have no proper relation, for there was no antecedent hiring or promise to pay. The matter was, therefore, not a corrupt practice.

If it had been a corrupt practice, it would have avoided Price's vote, but not McKay's vote, for he was the person hired, if there had been a hiring, and such a person is not deprived of his vote.

This act, if it had been established to have been a corrupt practice, would not have defeated the election, because it has not been found to have been "committed by or with the knowledge and consent of the candidate;" on the contrary, the very opposite fact has been found for the candidate.

2. That the giving of liquor, as found by the case, by Houston, does not avoid his vote. I have more doubt as to the selling of liquor by Burns, but I am not so free from doubt as to find against him, on the case submitted.

I am of opinion, therefore, that neither of their votes has been avoided.

Morrison, J., concurred.

Draper, C. J. of Appeal, was not present during the argument, and took no part in the judgment.

In re Election for the Electoral Division of the County of Monck

32 Vict., ch. 21, ss. 57—List of Voters not delivered in time—Wrong list used—Amendment of petition.

[32 U. C. Q. B., 147.]

The 32 Vict., ch. 21, sec. 7, and sub-sec. 1, enacts that the clerk of each municipality shall, in each year, make from the assessment rolls a list of the persons entitled to vote therein, and deliver it to the Clerk of the Peace on or before the 15th August. By sub-sec. 3, this period shall be directory only to the clerk, "and the said lists shall be valid and effectual for the purposes of this Act, even though not so completed and delivered by the said period of time;" and by sub-sec. 10, no person shall be admitted to vote unless his name appears on the last list of voters, delivered to the Clerk of the Peace "*at least one month before the date of the writ to hold such election.*"

The writ to hold the election was tested on the 25th February, 1871. The list of voters for one of the townships in the Electoral Division was made up from the assessment roll of 1870, and sworn to on the 13th August; but it was not

delivered to the Clerk of the Peace until the 17th March, 1871. The list for 1869 had been delivered on the 19th August of that year.

Per *Richards, C. J.*, and *Morrison, J.*, the list of 1869 was the one which should have been used.

Per *Wilson, J.*, that of 1870 was properly used; for that the month should be construed to mean a month from the 15th August, when the roll should have been, or any earlier day when it may in fact have been, delivered; that the roll, though delivered too late, would not otherwise be "valid and effectual for the purposes of this Act;" and the neglect of the clerk should not be allowed to disfranchise voters.

There were 41 voters on the list of 1869 who were not on that of 1870, but it was not shown that the vote of any one entitled to vote by either list had been rejected; nor was it shown or suggested that the use of one roll instead of the other could have in any way affected the result of the election. *Held*, that the election was not avoided.

Held, also, that the Judge had power to amend the petition by allowing the insertion of an objection to the roll used.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS

FOR MAY, JUNE AND JULY, 1872.

(*From the American Law Review.*)

Absolute Gift.—*See* Construction, 1.

Abuttor.—*See* Highway.

Accounts.—*See* Letters Patent, 2; Pleading, 1; Practice, 2.

Ad Damnum.—*See* Practice, 1.

Ad Filum Viæ.—*See* Highway.

Administration.

1. Administration will not be granted to a person having no interest in the estate, even though all the next of kin desire his appointment. Under 20 & 21 Vict. ch. 77, § 73, administration must be offered to each of the next of kin qualified successively, and afterwards to other persons interested.—*Teague et al.* v. *Wharton*, L. R. 2 P. & D. 360.

2. L. assigned what he supposed was a certain interest in an estate. He had in fact no interest at the time, but afterwards acquired the same interest in another way. He executed the deed of assignment in his supposed capacity, and not in that by virtue of which he afterwards became entitled. *Held*, that his assignee was not entitled to be limited administrator, but must apply to chancery to secure his rights in the estate of his assignor.—*Bardon* v. *Morgan*, L. R. 2 P. & D. 371.

Administrator. — *See* Executor and Administrator.

Admissibility.—*See* Confession; Evidence, 1.

Adoption of Suit.—*See* Solicitor, 3.

Adultery.—*See* Divorce, 1, 2; Evidence, 2.

Advance Shares.—*See* Executor and Administrator.

Advancement.—*See* Hotchpot.

Affidavit.—*See* Evidence, 1.

Agreement.—*See* Railway, 2; Statute of Frauds.

Agreement to Sell.—*See* Purchase-Money.

Amalgamation.—*See* Company, 1.

Annuity.—*See* Forfeiture, 1; Legacy, 2.

Answer.—*See* Pleading, 1; Practice, 4.

Anticipation, Power of.—*See* Estate for Life.

Appeal.—*See* Practice, 2.

Arbitrator.—*See* Evidence, 4.

Assignee.—*See* Administration, 2; Bankruptcy, 3.

Assignment.—*See* Power of Sale.

Assignment of Contract.—*See* Vendor and Purchaser, 2.

Assignment of Freight.

W., a ship-owner, assigned unearned freight to plaintiff. Afterwards, with knowledge of the assignee, W. mortgaged the ship without notice to the mortgagees of the assignment of freight. *Held*, that the mortgagee was entitled to the freight.—*Wilson* v. *Wilson*, L. R. 14 Eq. 32.

Auction.

Plaintiff and M. were partners, and gave authority to defendant, an auctioneer, to sell partnership goods on premises which had been occupied by M., and in respect of which he owed rent. It was a condition of the sale that at the fall of the hammer, each lot should be at the risk of the purchaser, and the auctioneer should not be responsible for loss after that time. After the sale, the landlord refused to let some goods go unless the rent in arrears was paid. The auctioneer paid the amount to release the goods. *Held*, that as the property, subject to existing liens, had passed to the purchaser, the auctioneer was liable to the plaintiff for the amount paid.—*Sweeting* v. *Turner*, L. R. 7 Q. B. 310.

Award.—*See* Evidence 4; Lien.

Bailment.—*See* Bailor and Bailee.

Bailor and Bailee.

Plaintiff, a cab-driver, got a horse and a cab from a cab-master, the master to pay for the horse's feed, and the driver to pocket all he earned beyond eighteen shillings. The horse was unfit for the work, and threw the driver out and injured him. *Held* (Willes, J., dissenting), that the parties were in the relation of bailor and bailee, and the master was responsible.—*Fowler* v. *Lock*, L. R. 7 C. P. 272.

Bank Book.—*See* Donatio Causa Mortis.

Bankrupt.—*See* Forfeiture, 1.

Digest of English Law Reports.

Bankruptcy.

1. The Court of Bankruptcy has no power to set aside a deed given to the receiver and trustee, as security for costs, after a composition, although the deed be alleged to have been obtained by duress or pressure.—*Ex parte Lyons, In re Lyons*, L. R. 7 Ch. 494.

2. W. D. assigned his property in bankruptcy. He did business in England under the name of D. & Co., and in Brazil under that of D., L. & Co. In Brazil he went through a proceeding corresponding to bankruptcy, according to which the creditors of D., L. & Co. would have priority. Holders of bills drawn by D., L. & Co. upon D. & Co., and accepted by the latter, proved in Brazil and received a dividend. They then claimed to prove in England. *Held*, that they could receive nothing further, till the other creditors in England had received a proportionate dividend.—*Ex parte Wilson, In re Douglas*, L. R. 7 Ch. 490.

3. Defendant's assignee of a lease became bankrupt, and the trustee in bankruptcy disclaimed the lease under section 23 of the Bankruptcy Act, which enables trustees of bankrupts' property to disclaim and surrender, among other property, an unprofitable lease. In an action by the original lessor, *held*, that the lessee was liable for rent.—*Smyth* v. *North*, L. R. 7 Ex. 242.

See Forfeiture, 2, 3; Mortgagor and Mortgagee.

Bargeman.—*See* Common Carrier.

Barrister.

N. being a barrister and advocate in India, was reported to the high court of judicature, by the judge of the district court, as guilty of professional misconduct. Upon an order to him to show cause, it was shown that he had procured a client of his to write a letter to a firm of bankers asking for a loan on her indigo business, with a view to getting some of his fees out of said loan; and also that he had procured his said client to indorse some promissory notes as administratrix, on the strength of an application he had made for her appointment as such, which application afterwards failed, for the reason that she was not legally eligible to the office. *Held*, that his conduct did not amount to that degree of *mala praxis* sufficient, in India, to warrant a suspension from practice for five years.—*Newton* v. *The Judge of the High Court, North-western Provinces*, L. R. 4 P. C. 18.

Bequest.—*See* Construction, 1; Will, 4, 6, 7.

Belligerent Waters.—*See* Construction of Statute.

Bigamy.

A. having a wife living, went through a due form of marriage with a former wife's niece. *Held*, that he was guilty of bigamy, notwithstanding the fact that the attempted marriage would have been void, *in scipso*.—*The Queen* v. *Allen*, L. R. 1 C. C. R. 365.

Bill in Equity.—*See* Equity.

Bill of Lading.—*See* Freight.

Blockade.—*See* Contract, 1.

Breach of Covenant.—*See* Landlord and Tenant, 1.

Breach of Trust.—*See* Equity.

Builder.—*See* Liability of Builder.

Burden of Proof.—*See* Practice, 6.

Buyer and Seller.—*See* Sale.

Cab-Driver.—*See* Bailor and Bailee.

Carrier.—*See* Common Carrier.

Charitable Fund.—*See* Cy Pres.

Charity.—*See* Cy Pres; Will, 9.

Charterer.—*See* Salvage, 1.

Charter-Party.

Plaintiffs made a charter party with the defendant that the latter's ship should proceed to a certain port and load with coals, and deliver the same at a given place on being paid a fixed freight. Until the end of September the ship was to load with A. or B., at captain's option; after September with B. In September plaintiffs refused to load with A. *Held*, that the refusal discharged defendant from the charter-party entirely.—*Bradford et al.* v. *Williams*, L. R. 7 Ex. 259.

See Contract, 1; Freight.

Check.—*See* Donatio Causa Mortis.

Children.—*See* Will, 10.

Christian Religion.—*See* Custody of Child.

Civil Code of Lower Canada.—*See* Liability of Builder.

Codicil.—*See* Legacy, 1.

Collateral.—*See* Company, 4.

Collision.

1. The sixteenth article of the Admiralty Rules, which provides that "every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed," applies only to cases of continuous approach; and when one of two steamers which "are meeting end on end so as to involve risk of collision," duly ports her helm so as to bring them port light to port light, she need not slacken speed, and is not to blame for collision.—*The Owners of the Screw Steamship Jesmond* v. *The Owners of the Screw Steamship Earl of Elgin*, L. R. 4 P. C. 1.

2. A steamer moved from her moorings at night, and lay athwart the stream, so that her

regulation lights could not be seen by a sailing vessel coming up the stream; a common lantern was hung out on the side towards the sailing vessel, but it was not seen by those on the latter. *Held*, that the steamer should have exhibited her riding lights, or used as a warning signal the very best lights she had on board; and that the failure so to do was negligence.—*The John Fenwick*, L. R. 3 Adm. and Ec. 500.

Comity.—*See* Foreign Judgment.

Common Carrier.

Defendant owned barges, and let them to carry goods between various termini. The goods of one customer only were carried at a time, and the customer fixed the termini of the trip in each instance. *Held*, a common carrier. —*Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267.

Company.

1. Company A. was amalgamated with company B, and the shareholders of company A. were at liberty to take shares in the new company. A shareholder applied for shares, agreeing to take the same, and asking to have his name inserted in the shareholders' register, and he was duly allotted shares. He subsequently withdrew his application. *Held*, on the winding up of the new company, that he was a shareholder, and that the directors had no right to release him.—*In re United Ports Company*, L. R. 13 Eq. 474.

2. An insurance company, unregistered and limited, became insolvent, and registered as an unlimited company. *Held*, that the shareholders were not liable beyond the amount of their shares, except for the costs of winding up.—*Lethbridge* v. *Adams*, L. R. 13 Eq. 547.

3. A. transferred to B. shares in a joint-stock company, numbered as stated in the transfer. A. had no shares thus numbered, but was owner of the same number of shares bearing different numbers. *Held*, that the transfer was good, and that B. was a contributory.—*In re International Contract Company*, L. R. 7 Ch. 485.

4. A railway company loaned money to a hotel company to build a hotel at the terminus of the railway, and took as security shares in the hotel company, which were placed in the hands of trustees, who had power to sell them and pay off the debt. The railway company afterwards purchased the hotel, and the hotel company was wound up. *Held*, that the railway company were creditors and not shareholders in respect of the loan, and the shares deposited with trustees.—*In re City Terminus Hotel Company*, L. R. 14 Eq. 10.

See Equity; Railway, 1; Ultra Vires.

Compensation.—*See* Damages, 2.

Competency.—*See* Evidence, 3.

Composition.—*See* Bankruptcy, 1.

Condition.—*See* Condition Precedent.

Condition Precedent.

The words of a Railway Act as to damages were affirmative, that upon notice to treat, agreement and award, and payment or tender of the award, the latter should vest the power in the company. *Held*, that notice to treat and the subsequent proceedings were not a condition precedent to the rights of the company conferred by the Act.—*Jones* v. *Stanstead, Shefford, & Chambly R. R. Company*, L. R. 4 P. C. 98.

See Charter-Party.

Confession.

Two boys, eight and nine years old, were apprehended for misdemeanor, and the mother of one said to them in presence of the policeman, "You had better, as good boys, confess." Whereupon they confessed. *Held*, that the confession was admissible. — *The Queen* v. *Reeve et al.*, L. R. C. C. R. 362.

Conflict of Laws.—*See* Bankruptcy, 2.

Consideration.—*See* Contract, 3; Deed.

Construction.

1. Testator by apt words devised all his personal and real property absolutely to S., a married woman, and added a trust as to the real estate, and wound up with this clause: "And as to the personal property so given, as aforesaid, to the said S., to and for her sole and proper use and benefit for ever, . . the proceeds to be applied" in bringing up her children. *Held*, an absolute gift as to the personalty.

2. A testatrix, in a document styled her "last will and testament," named an executor, and gave certain legacies, among them this: "To W. and E.'s three children £10 each, and my furniture to be equally divided amongst them." She wound up thus: "After these legacies are paid I leave to my sister S. to be equally divided amongst her children or grandchildren." W. and E. had four children. *Held*, that each child of W. and E. took £10 and a quarter of the furniture, and that the last clause was a good gift of the residue.—*In re Bassett's Estate, Perkins* v. *Fladgate*, L. R. 14 Eq. 54.

3. The words "legal representatives in due course of administration," in a marriage settlement, were *held* to mean next of kin, and not executors and administrators,—*Briggs* v. *Upton*, L. R. 7 ch. 370.

4. A gift for life of a business and perishable

stock necessary to carry it on, confers a life interest in the latter, and the stock must be kept good. A gift purporting to be for life of consumable goods unconnected with a business is absolute.—*Cockayne* v. *Harrison*, L. R. 18 Eq. 432.

See Collision, 1; Condition Precedent; Contract, 4; Debt; Forfeiture, 3; Hotchpot; Legacy, 1, 2; Sale; Will, 2, 3, 7.

Construction of Statute.

1. For the owners of an English tug to engage in towing a prize vessel, with prisoners and a detached prize crew, from English into belligerent waters, where the prize would be safe in the hands of the government to which the captors belonged, was *held* "dispatching a ship for the purpose of taking part in the naval service of a belligerent" within the meaning of the Foreign Enlistment Act of 1870.—*Dyke* v. *Elliott, The "Gauntlett,"* L. R. 4 P. C. 184.

2. A company granted to a licensee "the sole and exclusive right, license, and authority" to carry on a certain business within certain limits, and agreed to furnish him with material. The company had no legal control in respect of said business over the limits described. The licensee paid £1,500 down, and agreed to pay the balance of the consideration (£6,000) in monthly instalments, of £1,000 each. *Held*, that for the purpose of the Stamp Act, the license was not a "conveyance on sale," and that the monthly payments of £1,000 were "periodical payments."—*Limner Asphalte Paving Company* v. *Commissioner of Internal Revenue*, L. R. 7 Ex. 211.

3. One section of the Contagious Diseases Act says: any person "shall be deemed guilty . . . unless he show to the satisfaction of the justices before whom he is tried," &c.; another fixed the penalty for any person "guilty of any offence against this act;" another provides for appeal in case he feels "aggrieved by . . . adjudication of the justices with respect to any penalty under this act," &c.; but no jurisdiction is expressly conferred upon the justices. *Held*, that two justices could summarily convict under the act.—*Cullen* v. *Trimbles et als.* L. R. 7 Q. B. 416.

See Municipal Election.

Consumable Goods.—*See* Construction, 4.

Continuing Guarantee.—*See* Guarantee.

Contract.

1. Defendants by a charter-party agreed to proceed with reasonable dispatch to a spout, load with coal, and go thence as soon as wind and weather should permit to H. There was the usual exception as to delay from restraint of princes. Before any breach, and before any thing was done under the charter-party, H. was blockaded, and defendants refused to proceed to the spout. *Held*, in a suit for damages, that defendants were not liable, it having turned out that the blockade was still subsisting at the time defendants would have reached H. had they proceeded with reasonable speed.—*Geilpe* v. *Smith et al.*, L. R. 7 Q. B. 404.

2. Plaintiff entered the employ of defendants under a written agreement, dated April 18, 1871, stipulating that he should receive "a salary of £3 per week, and house to live in from the 19th of April, 1871." *Held*, a hiring from week to week, and that evidence of a verbal understanding, that the engagement was for a year, was inadmissible.—*Evans* v. *Roe et al.*, L. R. 7 C. P. 138.

3. The substance of a guarantee to plaintiff signed by defendants was as follows: "In consideration of your withdrawing the petition you have presented . . . we agree to pay you all costs you have incurred. . . . We further agree to guarantee to you the payment within 18 months . . . of . . . your debt of £722." Plaintiff asked for leave to withdraw the petition in question, which the court did not expressly grant, but ordered plaintiff to pay the costs of the petition. Within 18 months plaintiff presented another similar petition. *Held*, that the consideration was good, that it applied to both parts of the guarantee, and that there had been performance of the condition by plaintiff.—*Harris* v. *Venables*, L. R. 7 Ex. 235.

4. Defendant wrote to plaintiff as follows: "Ship me 500 tons sugar, say 26*s.* 9*d.* for Nos. 10 and 12, to cover cost, freight, and insurance; 50 tons more or less of no moment, if it enables you to get a suitable vessel; provide insurance; draw on me for costs, as is customary. I should prefer option of sending vessel to London, Liverpool, or Clyde; but if not compassable you may ship to either London or Liverpool." In a telegram sent afterwards, "the ship" was ordered to call at a good port for orders. Plaintiff, in his reply, spoke of the order as for "a cargo about 500 tons," and of "your remarks regarding the destination of the vessel." Plaintiff procured 393 tons, and shipped it, intending to procure and ship the balance as soon as he was able to do so. *Held* (Byles, J., dissenting), that defendant was bound to accept the cargo. Whether the relation of plaintiff and defendant was that of principal and agent, or of vendor and pur-

chaser, *quære.—Ireland* v. *Livingston*, L. R. 5 H. L. 395.

See Charter-Party; Insurance; Sale.

Conveyance on Sale.—*See* Construction of Statute, 2.

Conversion of Shares.—*See* Will, 1.

Copy.—*See* Covenant.

Co-respondent.—*See* Costs; Divorce, 3.

Costs.

Costs against the co-respondent in trial for divorce on the ground of adultery, where a decree *nisi* was granted, will not be remitted, although a petition to make the decree absolute is dismissed on the ground of subsequent adultery of the petitioner.—*Hulse* v. *Hulse et al.*, L. R. 2 P. & D. 357.

See Company, 2; Divorce, 2; Letters-Patent, 2.

Counsellor.—*See* Barrister and Advocate.

Covenant.

A legal and reasonable covenant in a separation deed will be enforced, although some parts of the deed are invalid. A husband cannot keep and use copies of his wife's private papers, which he has covenanted in a separation deed to give up.—*Hamilton* v. *Hector*, L. R. 13 Eq. 511.

See Construction of Statute, 2; Injunction, 3; Landlord and Tenant, 1, 3; Railway, 1.

Creditor.—*See* Company, 4; Proof of Claim.

Criminal Law.—*See* Indictment.

Crown.—*See* Prerogative of Crown.

Cumulative Legacy.—*See* Legacy, 1.

Curator Bonis.—*See* Lunatic.

Custody of Child.

The appellant was widow of a British subject in India, professing the Christian religion, and of their marriage the child in question was born. After the death of the husband, appellant lived with a man professing the Christian religion, and having a Christian wife. Subsequently appellant and the man with whom she lived professed the Mahomedan faith, and a Mahomedan marriage was alleged to have been performed. The child remained with her mother until ordered by the judge at Meerut to be given into the custody of a Christian guardian. She was then fourteen years of age, and professed the Mahomedan religion. *Held*, that the order be confirmed, and the appeal from it dismissed.—*Skinner* v. *Orde et al.*, L. R. 4 P. C. 60.

Cy Près.

A fund was raised to build a church for persons who could not speak English, where service might be held in *Gaelic*. No *Gaelic* clergyman could be found, and not persons enough speaking that language to attend the service, and the fund was used to found the *Caledonian Asylum*. Petition was afterwards made setting forth that a Gaelic-speaking clergyman and audience were forthcoming if there were a church. *Held*, that the fund should not be diverted from the Asylum.—*Attorney-General* v. *Stewart*, L. R. 14 Eq. 17.

Damages.

1. Defendant unlawfully washed his van in the street, and let the water run off into a grating twenty-five yards distant. The grating, unknown to defendant, was frozen over, and the water ran into the street and formed ice. Plaintiff's horse fell thereon and broke his leg. Damage *held* too remote to make defendant liable.—*Sharp* v. *Powell*, L. R. 7 C. P. 253.

2. Plaintiff was owner of a mansion, in the rear of which was a garden running down to the Thames, and separated from it by a wall. At high tide the water came up to the wall, so that boats could be loaded and unloaded at a door in the wall. At low tide he reached the water by a paved jetty running from the door to the water, and kept in repair at his expense. The river was filled up by a company under authority of Parliament, a strip of dry land formed between the water and the garden wall, and on the side of this strip, next the water, a road was opened. The claim for compensation was referred to an arbitrator, who took into account the loss of privacy and quiet by reason of the loss of the river frontage, the loss of said frontage, and the great amount of noise and traffic and dust on the road, thus arriving at a conclusion as to how much less on the whole a man would give for the property for the only use it could be put to with profit, than it would have fetched before the alterations. *Held*, that the award must be sustained.—*The Duke of Buccleugh* v. *The Metropolitan Board of Works*, L. R. 5 H. L. 418.

See Proximate and Remote Cause.

Debt.

A husband under a power of apportionment in a marriage settlement afterwards appointed a sum to a son. Upon the husband's death his executors claimed that this sum was a *debt* of the deceased, and it was so *held*.—*The Lord Advocate of Scotland* v. *Hogart*, L. R. 2 H. L. (Sc.) 217.

See Will, 5.

Decree Nisi.—*See* Costs; Divorce, 2.

Deed.

G. while in prison on a charge of murder executed a voluntary deed under the apprehension that he might be convicted and suffer forfeiture. He was acquitted as being insane. *Held*, that the deed was void as being without consideration, and executed by an insane man. —*Manning* v. *Gill*, L. R. 13 Eq. 485.

Deed of Gift.—*See* Undue Influence.

Defective Foundation.—*See* Liability of Builder.

Delay.—*See* Undue Influence.

Delivery.—*See* Sale.

Demurrer.—*See* Pleading, 1, 2.

Deposit of Title-Deeds.—*See* Vendor and Purchaser, 2.

Descriptio Personarum.

It is not fatal misdescription in a transfer of stock to call a journeyman butcher "gentleman."—*In re European Bank*, L. R. 7 Ch. 292.

Deviation.—*See* Freight.

Devise.—*See* Will, 4, 6.

Director.—*See* Ultra Vires.

Disclaimer.—*See* Bankruptcy, 3.

Discovery.—*See* Pleading, 1; Practice, 5.

Discretion.—*See* Lunatic.

Discretion of Trustees.—*See* Forfeiture, 1.

Documents.—*See* Practice, 3, 5.

Domicile.—*See* Will, 9.

Donatio Causa Mortis.

Deceased gave a cheque and his bank book to his nephew, intending to make the latter a present of the amount of the cheque. Next day, before the cheque was presented, the uncle died. *Held*, not a valid gift.—*In re Beale's Estate*, L. R. 13 Eq. 489.

Duress.—*See* Bankruptcy, 1.

Ejectment.—*See* Landlord and Tenant, 1.

Equitable Mortgage.—*See* Vendor and Purchaser, 2.

Equity.

A company made an unauthorized loan to a society. When the loan was called in the society gave a cheque for the amount to its agent, who was also a manager in the company. He embezzled it. *Held*, that the company could maintain a bill for the recovery of the money.—*Hardy* v. *Metropolitan Land and Finance Company*, L. R. 7 Ch. 427.

See Cy Pres; Pleading, 1; Prerogative of Crown; Scandalous Matter; Vendor and Purchaser, 2.

Equity Pleading.—*See* Pleading.

Equity Practice.—*See* Practice.

Estate for Life.

Testator gave an estate to trustees in trust for his granddaughter, and directed that if she married under twenty-one the estate should be settled on her for life to her separate use without power of anticipation, remainder to her children. The trustees were authorized to give her husband a life-estate from her decease, and either with or without impeachment of waste. *Held*, that an estate to her "without impeachment of waste," was inconsistent with the other provisions as to the estate.—*Clive* v. *Clive*, L. R. 7 Ch. 433.

See Will, 7.

Estate Tail.—*See* Statute of Limitations.

Evidence.

1. An exhibit annexed to an affidavit, of a statement alleged to have been made by A. inconsistent with an affidavit made by him, is not admissible in evidence.—*Hanning* v. *Maddick*, L. R. 7 Ch. 395.

2. On a hearing to show cause why a decree of divorce *nisi* should not be made absolute, evidence was offered by the Queen's proctor, that a man giving the name and address of the petitioner had been living with a woman named, at a specified place and time since the decree *nisi*. Petitioner offered no evidence in rebuttal. *Held*, sufficient *prima facie* evidence of identity to warrant a dismissal of the petition.—*Hulse* v. *Hulse et al.*, L. R. 2 P. & D. 357.

3. Where a man is indicted and tried with others, his wife cannot testify for them any more than he can himself.—*The Queen* v. *Thompson et al.*, L. R. 1 C. C. R. 377.

4. An arbitrator may be a witness as to the proceedings before him up to the time he made his award, in a proceeding to enforce the same, but cannot be asked how the award was arrived at, or what items it included, or what meaning or effect he intended to be given to it. —*The Duke of Buccleugh* v. *The Metropolitan Board of Works*, L. R. 5 H. L. 418.

See Confession; Contract, 2; Injunction; Legacy, 12; Practice, 5–7; Railway, 2; Undue Influence; Will, 2.

Executor.—*See* Executor and Administrator.

Executor and Administrator.

An executor, as such, may mortgage property by power-of-sale mortgage to a building society, wherein he takes "advance" shares, for which he agrees to pay, with all fines for non-payments within a certain time, according to the rules of the society, such arrangement being made a part of the condition of the mortgage, and as part consideration for the loan.—*Cruikshank* v. *Duffin*, L. R. 13 Eq, 555.

See Construction, 3; Partnership, 1; Will, 5.

Executory Contract.—*See* Contract, 1.

Exhibit.—*See* Evidence, 1.

Extension of Patent.—*See* Letters-Patent, 1.

Extrinsic Evidence.—*See* Legacy, 1, 2; Will, 2.

Failure of Trust.—*See* Will, 6.

Fee in Street.—*See* Highway.

Firm Name.—*See* Partnership, 2.

Forbearance.—*See* Contract, 3.

Foreclosure.—*See* Mortgage.

Foreign Court.—*See* Foreign Judgment.

Foreign Judgment.

A foreign judgment of a competent court may be impeached if there is error on the face of it, or if it is shown to have been obtained by fraud, or is opposed to natural justice; it cannot be enforced against those not parties to it, unless it be in *rem*.—*Messina* v. *Petrococchino*, L. R. 4 P. C. 144.

Forfeiture.

1. A testatrix gave her husband an annuity for life, with discretion in the trustees to withhold it, and allow it to fall into the general fund if they saw fit, and with a proviso, also, that if the husband should become bankrupt, or do any acts which, if the annuity were his absolutely, would vest it in any other person, payment of it should cease in the same manner as if he were dead. The testatrix knew that her husband was bankrupt at the time she made the will. *Held*, that the annuity fell into the general fund.—*Trappes* v. *Meredith*, L. R. 7 Ch. 248.

2. A testator gave a fund to trustees to pay the income to R. "so long as" he "should not do any act to deprive" himself "of the benefit thereof." In that event the income was thenceforth to be paid to others. R. became bankrupt, and the trustees paid the income into court for several years; R. finally assigned to the assignee in bankruptcy all the accumulated dividends and obtained his discharge. On a petition to have the accrued dividends paid to the assignee, and the future ones to himself, *held*, that there had been a forfeiture. —*In re Pornham's Trusts*, L. R. 13 Eq. 413.

3. A testator provided that the life-estate should be forfeited if the tenant for life should "assign over, assure, mortgage, or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever part from" the proceeds. *Held*, that a petition for arrangement under the Bankrupt Act by the tenant for life worked a forfeiture.—*In re Amherst's Trusts*, L. R. 13 Eq. 464.

See Landlord and Tenant, 1.

Frauds, Statute of.—*See* Statute of Frauds.

Fraudulent Conveyance.—*See* Stat. of Frauds, 2.

Freight.

An English cargo was shipped on board a Prussian ship, under a charter-party and bill of lading, by which she was to proceed to Falmouth for orders to proceed to any one safe port in Great Britain, or on the continent between Havre and Hamburgh, and there deliver the cargo. The ship reached Falmouth July 10th. The master there heard rumors of war between France and Germany. On the 11th consignee ordered him to proceed to Dunkirk and discharge. He arrived off Dunkirk on the night of the 16th, where a pilot boarded him, and told him war had been declared two days before. Thereupon he put back to The Downs, where he could learn nothing. On the 18th he was told by the German consul at Deal, where he went ashore, that war had been declared. He then telegraphed the owners for orders, who forbade him to go to Dunkirk. On the 19th he put into Dover, the nearest port, and on that day war was declared. On the 23rd, the consignees ordered him to Dunkirk, and on his refusing to go, required him to deliver the cargo at Dover. This he refused to do unless his freight was paid. *Held*, that he had committed no improper deviation, and no breach of contract, and that freight must be paid.—*Duncan* v. *Koster*, "*The Teutonia*," L. R. 4 P. C. 171.

See Assignment of Freight.

Fund in Court.—*See* Solicitor, 4.

Future Church.—*See* Will, 4.

General Guarantee.—*See* Guarantee.

Gift for Life.—*See* Construction, 4.

Gift of Residue.—*See* Construction, 2.

Gift to a Class.—*See* Construction, 2.

Guarantee.

W. had overdrawn £3,000 at his bank, and wished for more credit. The bank took as security a note for £2,000 signed by W.'s father, a deposit of some title-deeds, and a guarantee under seal by the latter, whereby he agreed that the said deeds should remain with the bank as security for the payment "of all money due or to become due" from the son. *Held*, a continuing guarantee for all sums advanced to the son. *Semble*, that a general guarantee under seal can be terminated.—*Burgess* v. *Eve*, L. R. 13 Eq. 450.

Guardian and Ward.—*See* Custody of Child.

Heir-at-Law.—*See* Purchase-Money.

Highway.

It is doubtful whether there is any presumption of law that an abuttor on a highway owns

the fee *ad medium filum viæ.*—*Beckett* v. *The Corporation of Leeds*, L. R. 7 Ch. 421.

Hotchpot.

J. devised and bequeathed real and personal estate to trustees for conversion after the death or marriage of his widow. The widow was to occupy his business premises, and use the property therein during her life, or till her marriage. Trustees were to sell the "personal trust property not invested," and pay the widow the income of the proceeds during life or until marriage. They were further directed to hold the trust property in trust for the children living at the death or marriage of the widow, and their issue then living of children dying before that time, such issue to take "according to the stocks, and not to the number of individuals composing a class." His real estate was to be considered converted at the time of his death. No child to whom testator had made an advance during his lifetime was to share in the trust property "without bringing the portion so paid . . . into hotchpot." A daughter died after testator, leaving issue. *Held*, that such issue could not be brought within the hotchpot provision.—*Hewitt* v. *Jardine*, L. R. 14 Eq. 58.

Husband and Wife.—*See* Bigamy; Evidence, 3.

Identity.—*See* Evidence, 2.

Indictment.

By a statute it was provided that any one convicted of a certain crime "after having been previously convicted of felony," should suffer a certain punishment. Prisoner was proved to have been before convicted of felony but the indictment failed so to state. *Held*, that the statute did not apply.—*The Queen* v. *Willis*, L. R. 1 C. C. R. 363.

Infant.—*See* Solicitor, 3.

Infant, Custody of.—*See* Custody of Child.

Infringement of Patent.—*See* Practice, 2.

Injunction.

1. The Court of Chancery will not enjoin the Bank of England from requiring more evidence of a death than the court itself is in the habit of considering sufficient in similar cases.—*Prosser* v. *Bank of England*, L. R. 13 Eq. 611.

2. The court will not enjoin the publication of an alleged libellous document, at least when it is reasonably certain that there is no malice.—*Mulkern* v. *Ward*, L. R. 13 Eq. 619.

3. T. sold his rights in a manor to D. & F., who sold it to the Board of Works, for the purpose of converting it into a metropolitan common under the act giving the Board power to lay out commons. In the conveyance to D. and F. there was a stipulation, that if within five years the manor should not be used for a common without buildings upon it, T. might repurchase what he had sold at a stated price. The Board proposed, in a petition to the Inclosure Commissioners, to lay out the common, and on one portion of it build houses, the rent of which would help pay the expenses. The commissioners drafted a scheme in conformity to the proposal of the Board. In order for this scheme to go into effect, it was necessary that it should go before Parliament. *Held*, that injunction would lie in favor of T. against the Board to prevent it from doing anything contrary to the original stipulation between T. and D. & F.—*Telford* v. *Metropolitan Board of Works*, L. R. 13 Eq. 574.

See Prerogative of Crown; Scandalous Matter.

Insanity.—*See* Deed.

Insurance.

A. wrote to a mutual company for insurance, and agreed to be governed by the rules thereof. A policy duly stamped was issued to him, containing no allusion to the rules, and when that expired another like it issued. *Held*, that A. was bound by the rules.—*In re Albert Average Association*, L. R. 13 Eq. 529.

See Mortgagor and Mortgagee; Sale.

Intention.—*See* Will, 2, 8.

Interrogatories.—*See* Privilege.

Iron Mines.—*See* Surface Lands.

Issue.—*See* Will, 10.

Joint Tenant.—*See* Will, 8.

Joint Trial.—*See* Evidence, 8.

Judgment.—*See* Foreign Judgment.

Jure Coronæ.—*See* Prerogative of Crown.

Jury.—*See* Practice, 8.

Landlord and Tenant.

1. In a lease from plaintiff to C., the latter covenanted not to allow a sale by auction on the premises. On non-payment of rent, or breach of covenants, there was a proviso for re-entry. C. mortgaged goods on the premises with power in the mortgagees, on breach of condition, to sell by auction on the premises. C. afterwards mortgaged the premises to defendant by a sub-lease, with provision that C. should remain in possession. He afterwards assigned all his property for the benefit of creditors. There was breach of condition in both mortgages, and the mortgagees of the goods sold the same by auction on the premises, with C.'s consent, but without that of plaintiff. In ejectment by the plaintiff he assigned as breaches the auction sale; and also failure to pay rent since the sale. A judge's order directed a stay of proceedings on pay-

ment of the rent. The rent was refused by plaintiff, and it was paid into court. *Held*, that there was a forfeiture under the proviso not to allow an auction sale, notwithstanding C.'s assignment of his property; and that the claim of breach for non-payment of rent accruing subsequently, did not amount to a waiver of such forfeiture.—*Toleman* v. *Portbury et al.*, L. R. 7 Q. B. (Ex. Ch.) 344.

2. Statute of 4 Anne, ch. 15, § 10, protects tenants in respect of payments of rent made before notice of assignment of the reversion. L. demised premises to defendant for five years from July, 1864, at a rent of £55 per annum, payable quarterly; but paid down £170 as advance rent. L. subsequently mortgaged the premises to plaintiff. Afterwards B., claiming under a prior mortgage, commenced an action of ejectment against defendant, but abandoned it. Whereupon plaintiff's attorney wrote to defendant, saying that B. had abandoned his suit, and demanding the rent then due. *Held*, that in spite of the advance on account of rent, the defendant was liable to plaintiff from the time of demand, which, under the circumstances, was sufficient notice under the statute. —*Cook* v. *Guerra*, L. R. 7 C. P. 132.

3. Defendant in a conveyance to himself in fee covenanted for himself and his assigns, that the premises should not be used for a beer-shop. He subsequently leased the premises, and lessee covenanted not to carry on certain callings, not including that of selling beer, and defendant made a covenant for quiet enjoyment. Plaintiff, as assignor of this lease, opened a beer-shop on the premises, and defendant's vendor got an injunction from the chancery court to restrain him from carrying on the trade of selling beer. In an action on the express or implied covenants in defendant's lease, *held*, that the covenant for quiet enjoyment did not guarantee to the tenant that he might use the premises for any purpose not mentioned in the restriction in the lease.—*Bennett* v. *Atherton*, L. R. 7 Q. B. (Ex. Ch.) 316.

4. Plaintiff being an outgoing tenant, agreed with the incoming tenant for the value of certain things to be left on the place. It was the custom in such cases for the outgoing tenant and the landlord to make such an arrangement, the latter taking and paying for the things. The landlord informed the incoming tenant that rent was due from the outgoing tenant, and requested the former to pay the amount of valuation to him, the landlord, as was done. In an action by the outgoing tenant to recover that amount from the incoming tenant, *held*, that there must be nonsuit.—*Strafford* v. *Gardner*, L. R. 7 C. P. 242.

See Bankruptcy, 3.

Lease.—*See* Bankruptcy, 3; Landlord and Tenant, 3; Statute of Frauds, 1.

Legacy.

1. Testator left two codicils. In the first he gave certain legacies, to each of his servants a year's wages, and to D. W. £2,000. In the second he gave a less sum to three of the legatees named in the first codicil, a year's wages "literally interpreted" to each of his servants, £2,000 to a new legatee, W. E., and D. W. was not mentioned. In other respects the two codicils were alike. A letter from testator's solicitor was offered at the probate, advising the testator to copy the first codicil. *Held*, that the legacies were cumulative, and the letter inadmissible.—*Wilson* v. *O'Leary*, L. R. 7 Ch. 448.

2. Testator *inter alia* directed his trustees to pay £100 to his wife yearly during her life, so long as she and his son E. should live together, "but if they should cease to reside together," payment to cease. The widow and son lived together until his death. *Held*, that the payment did not cease at his death.—*Sutcliffe* v. *Richardson*, L. R. 13 Eq. 606.

3. A testator gave power to his trustees to sell real and personal estate, if they should think fit, and out of the residue of his real and personal estate to pay certain legacies. *Held*, that from the four corners of the will, it was a case for the payment of legacies out of both real and personal *pro rata*.—*Allan* v. *Gott*, L. R. 7 Ch. 439.

See Will, 9.

Legal Representative.—*See* Construction, 8.

Legatee.—*See* Will, 6.

Lessor and Lessee.—*See* Bankruptcy, 3.

Letters. — *See* Practice, 4; Statute of Frauds, 1.

Letters-Patent.

1. An American patented his invention in America, France, and England in the same year. The patent had run out in France, and was nearly out in America. *Held*, that it was not policy to renew it in England.—*In re Winan's Patent*, L. R. 4 P. C. 98.

2. On an application for an extension the judiciary committee required an intelligible statement of previous profits and losses on the patent to be filed, and without such statement refused to prolong the patent. Costs were awarded the *bona fide* opponents of the petition in the lump.—*In re Wield's Patent*, 4 P. C. 89.

Lex Domicilii.—*See* Will, 9.

Lex Loci.—*See* Will, 9.

Liability of Builder.

The civil code of Lower Canada, art. 1686, provides that "if a building perish in whole or in part within ten years from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work and the builder are jointly and severally liable for the loss." W., a builder, contracted prior to the passage of the code to build Christ Church Cathedral in Montreal, according to plans furnished by an architect, and upon a foundation laid by a previous contractor, and approved by an architect having charge of the work. Before the cathedral was finished the tower sank and damaged the building. The sinking was caused by defects in the nature of the soil under the foundation. *Held*, that the builder was responsible for the sinking, and the damage it caused.—*Wardle* v. *Bethune*, L. R. 4 P. C. 33.

Liability of Shareholder.—*See* Company, 2.

License.—*See* Construction of Statute, 2.

Lien.

The owner of land taken by a railway under the Lands Clauses Act has no lien on the land for the cost of the award by which the price to be paid was fixed.—*Ferres* v. *Stafford & Uttoxeter Railway Company*, L. R. 13 Eq. 524.

See Assignment of Freight; Auction 1, 2; Solicitor, 1–4.

Life Estate.—*See* Estate for Life.

Life Insurance.—*See* Mortgagor and Mortgagee.

Limitations, Statute of.—*See* Statute of Limitations.

Limited Administration.—*See* Administration, 2.

Limited Liability.—*See* Company, 2; Jurisdiction.

Loan.—*See* Company, 4.

Lords of the Treasury.—*See* Mandamus.

Lunatic.

G. became insane in France, and a *curator bonis* was appointed by the court there. A sum of money to which G. was entitled was paid into the English court under the Trustees Relief Act. The French *curator bonis* applied for this fund. *Held*, that the court had discretion, and would order payment of the income merely.—*In re Garnier*, L. R. 13 Eq. 532.

Mahomedan Religion.—*See* Custody of Child.

Mala Praxis.—*See* Barrister.

Manager.—*See* Partnership, 2.

Mandamus.

The Annual Appropriation Act set apart a portion of the money granted to the Queen to the payment of costs of "prosecution, hitherto paid out of county rates." Costs of certain prosecutions, were duly taxed and paid by the county treasurer, who sent the bill with his vouchers to the lords of the treasury. They returned the bills in part disallowed. A rule *nisi* for a mandamus to the lords of the treasury, commanding them to pay the said sums to the persons entitled having been obtained, *held*, that there was no such relation between the lords of the treasury as servants of the crown, and the payees of the money as would sustain mandamus, though the lords had erred in not paying the bills without questioning their correctness.—*The Queen* v. *The Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387.

Marriage—*See* Bigamy.

Marriage Settlement.—*See* Construction, 3; Debt.

Married Woman.—*See* Evidence, 3; Municipal Election.

Marshalling Assets.—*See* Will 9.

Master and Servant.—*See* Bailor and Bailee.

Misdescription.—*See* Descriptio Personarum.

Misjoinder.—*See* Pleading, 2.

Mistake.—*See* Vendor and Purchaser, 1.

Mortgage.

B. and H., mortgagees in possession, having a power-of-sale mortgage, filed a bill for foreclosure, and notified the parties interested of the hearing thereon. They then filed a petition in the matter of 25 and 26 Vict. 108, for leave to sell the surface lands apart from the mines. Granted.—*In re Wilkinson's Mortgaged Estates*, L. R. 13 Eq. 634.

See Assignment of Freight; Executor and Administrator; Landlord and Tenant, 2; Power of Sale; Vendor and Purchaser, 2.

Mortgagor and Mortgagee.

A holder of a policy on his own life, mortgaged it, and then became bankrupt, but continued to pay the premiums until his death. *Held*, that the premiums so paid should be deducted from the policy-moneys in favor of mortgagor's representatives as being in the nature of salvage-moneys.—*Shearman* v *British Empire Mutual Life Assurance Company*, L. R. 14 Eq. 4.

Mortmain Acts.—*See* Will, 4.

Multifariousness.—*See* Pleading, 2.

Municipal Election.

Married women cannot vote at municipal elections under 32 & 33 Vict. ch. 55, § 9, which provides, that in the Municipal Corporation Act the phrases indicating the male sex shall embrace persons of the female sex, for all purposes of voting provided for in that Act; and the Married Woman's Property Act, 33 and 34 Vict. ch. 93, confers no political rights, by

implication or otherwise.—*The Queen* v. *Harrald*, L. R. 7 Q. B. 361

Mutual Company.—*See* Insurance.

Necessaries.—*See* Solicitor, 4.

Negligence.—*See* Collision; Partnership, 2; Proximate and Remote Cause.

Next Friend.—*See* Solicitors.

Next of Kin.—*See* Administration, 1; Construction, 3.

Non-Joinder.—*See* Pleading, 2.

Notice.—*See* Condition Precedent; Landlord and Tenant, 2; Vendor and Purchaser, 2.

Notice to Treat.—*See* Railway, 2.

Obscene Publication.

One George Mackay was tried for selling under the direction of a religious society a book called "The Confessional Unmasked," consisting of extracts from Roman Catholic theologians and divines. The book was condemned as immoral and obscene. The society then published a "Trial of George Mackay," in which said book somewhat expurgated, but still offensive, was set forth as part of the proceedings. *Held*, that the publication was not privileged from being part of a judicial trial, and that the new issue should be suppressed. *Steel* v. *Brannan*, L. R. 7 C. P. 261.

Onus Probandi.—*See* Practice, 6.

Order of Inspection.—*See* Practice, 8.

Papers in Suit.—*See* Solicitor, 1.

Parent and Child.—*See* Undue Influence.

Parol Evidence.—*See* Contract, 2.

Parties.—*See* Pleading, 2.

Partner.—*See* Partnership, 1.

Partnership.

1. A., B. and C. were partners under articles which provided that, upon the death of one partner, the others should continue the business, and pay a portion of the profits to the representatives of the deceased. There was no capital in the firm, except about £100 worth of office furniture. After the death of A. his executors continued to receive a share of the profits, and to demand account of the business. *Held*, that they were not liable as partners.—*Home* v. *Hammond et al.*, L. R. 7 Ex. 218.

2. A manager of a partnership business agreed to act in the discharge of his functions "without infringing the copartnery rights of" a certain partner. Trustees representing three-fourths of the property authorized the manager to sign the partnership name. *Held*, that he must have the consent of the remaining partners whose rights he had agreed not to infringe. It is acting in excess of a general manager's legitimate powers to increase the wages of employés or to substitute new and expensive machinery, and negligence in him to deposit large sums of cash in banks, or to sign blank checks for clerks to fill up.—*Beveridge* v. *Beveridge*, L. R., 2 H. L. (Sc.) 183.

See Pleading, 1.

Partnership Books.

A defendant in a personal suit cannot be required to produce the books of a firm to which he belongs without the consent of his partners.—*Hodley* v. *McDougall*, L. R. 7 Ch. 312.

Patent—*See* Letters-Patent, 1, 2; Practice, 2.

Payment into Court.—*See* Jurisdiction.

Periodical Payment.—*See* Construction of Statute, 2.

Performance.—*See* Contract, 3.

Perpetuities, Statute of.—*See* Statute of Perpetuities.

Personal Estate.—*See* Legacy, 3; Will, 1, 9.

Plea to Jurisdiction.—*See* Practice, 4.

Pleading.

1. A bill to dissolve partnership, and for accounts, set forth a deed which showed that a certain sum had been put in by defendant. The bill said the sum named in the deed was incorrect, but did not pray that the accounts concerning it might be opened. Defendant said in his answer, that the accounts were looked upon as settled at the time of the deed, on the basis there set forth, and refused to give the items in reply to interrogatories. *Held*, that defendant need not demur under the circumstances, but might include all his defence in the answer.—*Wier* v. *Tucker*, L. R. 14 Eq. 25.

2. Bill filed by plaintiffs on behalf of themselves and all other owners and occupiers of land, other than waste land within the forest of E., except such owners and occupiers as were made defendants, the lords of manors within the forest, persons claiming waste lands which they had enclosed, the attorney-general, and all others interested. Plaintiffs set forth that they were owners and occupiers within the limits of the forest, that the crown had reserved rights therein, to which the rights of the manors were subject, that the forest courts had had jurisdiction immemorially, and that by the forest laws owners and occupiers had enjoyed common of pasture, appendant and appurtenant, in said waste lands from time immemorial. An injunction to restrain defendants from inclosing said waste lands was prayed, together with a general declaration of rights. *Held*, on demurrer, that there was equity in the bill, as being a claim for a general right against several persons claiming particular rights, that there was no misjoinder of

owners and occupiers, that the bill was not multifarious, and that the joinder of "others interested," either as plaintiffs or defendants, was not essential.—*Commissioners of Sewers of the City of London* v. *Glasse*, L. R. 7 Ch. 456.

See Indictment; Practice, 4; Statute of Frauds, 2.

Policy.—*See* Insurance; Mortgagor and Mortgagee.

Power of Anticipation.—*See* Estate for Life.

Power of Directors.—*See* Ultra Vires.

Power of Sale.

D. mortgaged an estate to I., with power of sale. I., after the mortgage became due, assigned it to K. and R. In this assignment the deed from D. was recited, and there was added: "but the said power has not been, and is not intended to be exercised." The recitals set forth also that K. and R. were to pay the mortgage on receiving an assignment of the security. I., at the request of D., assigned and confirmed to K. and R., the money due on the mortgage, and all "powers . . . for recovering the same . . . and every covenant and security therein . . . contained." I. also conveyed to K. and R. in mortgage with a new stipulation, as to time of payment of the debt, and with power of sale on default. D. confirmed the latter deed. *Held*, that the power of sale in the original mortgage from D. to I. was not lost by the subsequent assignments, and new covenants and recitals.—*Boyd* v. *Petrie*, L. R. 7 Ch. 585.

See Executor and Administrator; Mortgage.

Practice.

1. In an action against a foreign ship the præcipe laid the damages at £500, for which the owners gave bail. Judgment was given for £452 2s. 8d., with £432 10s. 3d. costs. Defendants paid the £500, and refused to pay more. The court ordered a writ to issue for the seizure of the ship, for payment of the balance.—*The Freedom*, L. R. 3 Ad. & Ec. 495.

2. In a suit for infringement plaintiffs obtained a verdict, and an order for an account of profits. Defendants appealed from the verdict, and on the hearing to take an account of profits refused to produce their books. *Ordered*, that the books be produced without awaiting the determination of the appeal.—*Saxby et al.* v. *Easterbrook, et al.*, L. R. 7 Ex. 207.

3. In an action against ship agents for damages for having been induced to take passage in an unseaworthy vessel, inspection of certain letters alleged to have been written by plaintiff's fellow-passengers to defendants, complaining of the condition of the vessel; and of letters of the masters and agent, written after the complaints, were asked for, on the ground that they contained information necessary to the cross-examination of witnesses of defendants. *Held*, no ground for inspection.—*Richards* v. *Gellatly et al.*, L. R. 7 C. B. 127.

4. The respondent to a divorce suit pleaded want of jurisdiction, and delayed filing an answer on the merits during the pendency of the hearing on said plea. *Held*, that she should have pleaded the facts as to jurisdiction in her answer on the merits, and filed her answer within the proper time.—*Wilson* v. *Wilson, et al.*, L. R. 2. P. & D. 341.

5. Two of the testator's three executors were, with others, his partners in business, where part of his property remained for some time after his decease. On a bill for an account of administration, *held*, that the books of the firm must be produced.—*Vyse* v. *Foster*, L. R. 13 Eq. 602.

6. A suit *in rem*, by the owners of ship A., was brought against ship B., in consequence of a collision. Afterwards a suit *in rem* against ship B. was brought by the owners of the cargo on ship A. *Held*, that an application for permission to use, in the second suit, the evidence adduced in the first could not be granted without the consent of the defendants.—*The Demetrius*, L. R. 3 Ad. & Ec. 523.

7. A view may be allowed the jury after the summing up of the judge.—*The Queen* v *Martin et al.*, L. R. 1 C. C. R. 378.

See Evidence, 1, 2; Letters-Patent, 3; Mortgage; Solicitor, 4.

Precedent Condition.—*See* Condition Precedent.

Premium.—*See* Mortgagor and Mortgagee.

Prepayment of Rent.—*See* Landlord and Tenant, 2.

Prerogative of Crown.

An action of trespass was begun by the copyholder and terre-tenant of lands, in respect of which the Queen as lady of the manor had granted a license to enter and dig for minerals, against the licensees. The Queen, by her attorney-general, filed a bill on the equity side, asking that the action at law might be restrained. *Held*, that the Queen being interested in the proceedings, had a right *jure coronæ*, to be a party thereto; and therefore equity had jurisdiction, and the injunction must go.—*Attorney-General et al.* v. *Barker et al.*, L. R. 7 Ex. 177.

Presumption.—*See* Highway.

Prima Facie Proof.—*See* Evidence, 2.

Principal and Agent.—*See* Contract, 4.

Priority.—*See* Assignment of Freight; Solicitor, 4.

Privilege.

A defendant declined to give certain information obtained from letters of his partner, although the letters were sent to him, for him to make use of in his defence. *Held*, that he was privileged with respect to the information contained in the letters.—*Phillips* v. *Routh*, L. R. 7. C. P. 287.

See Obscene Publication.

Prize.—*See* Construction of Statute, 1.

Probate.—*See* Administration, 1, 2; Will, 8.

Prochein Amy.—*See* Solicitor, 8.

Production of Documents.—*See* Partnership Books.

Professional Advice.—*See* Undue Influence.

Professional Misconduct.—*See* Barrister.

Profits.—*See* Partnership, 1.

Prohibition, Writ of.—*See* Jurisdiction.

Proof of Claim.

By the custom of Cornwall, a shareholder in a mine conducted on the cash-book plan, upon giving up his shares and paying calls, is entitled to his share of the stock and plant. A year after P.; a shareholder in a Cornish mine, had relinquished his shares as above, without being paid his share in the stock and plant, the company was wound up. *Held*, that P. might prove a claim for his share of the stock and plant, as a creditor.—*In re Prosper United Mining Company*, L. R. 7 Ch. 286.

See Bankruptcy, 2.

Proof of Death.—*See* Injunction, 1,

Provision for Children.—*See* Debt.

Proxies.—*See* Practice, 6.

Proximate and Remote Cause.

Defendants were negligent in allowing their vessel to strike on a bank; she was driven thence against the plaintiff's sea-wall, as was inevitable, after she had once struck the bank. *Held*, that defendants were liable.—*Romney Marsh* v. *Trinity House*, L. R. 7 Ex. 247; s. c. L. R. 5 Ex. 204.

See Damages, 2.

Public Safety.—*See* Liability of Builder.

Punishment.—*See* Indictment.

Purchase-Money.

H. agreed to purchase real estate, and died before the purchase was completed, and the vendor neglected to enforce specific performance. *Held* that the heir-at-law of H. was entitled to the purchase money.—*Hudson* v. *Cook*, L. R. 13 Eq. 417.

Quiet Enjoyment.—*See* Landlord and Tenant, 3.

Railway.

1. A railway company covenanted with parties who built refreshment saloons along the line, that all trains, "except . . . those not under the control of the company," should stop ten minutes at a certain station. The post-office department required the company to run a mail train, stopping five minutes at said station. *Held*, in an action on the covenant, that such train was not under the control of the company."—*Phillips* v. *The Great Western Railway Company*, L. R. 7 Ch. 409.

2. Plaintiff agreed with defendant company to sell it eleven acres of land, from a tract containing two hundred acres, at an agreed price; and it was further stipulated, that if the company wanted more land, it should pay at the rate of £100 per acre for it. The agreement was to be supplemental to the Lands Clauses Acts. The company took the eleven acres, and before the expiration of the power to take land given under its Acts, it gave notice to treat for three acres without mentioning the agreement. Subsequently the company abandoned its proposal to treat, and claimed under the agreement. The engineer testified that the three acres were needed for the business of the road. *Held*, that the company could take only a necessary quantity under the agreement, that it was not estopped from asserting the agreement by its notice to treat, that the engineer's word was *prima facie* evidence of what quantity of land the road needed; and that it should have the three acres at £100.—*Kempt* v. *Southeastern Railway Company*, L. R. 7 Ch. 364.

See Condition Precedent; Lien.

Ratability.—*See* Surface Lands.

Real Estate.—*See* Legacy, 3; Will, 9.

Realty and Personalty.—*See* Legacy, 3.

Rebuttal.—*See* Evidence, 2.

Recitals.—*See* Power of Sale.

Referee.—*See* Evidence, 4.

Remoteness.—*See* Will, 10.

Renewal of Patent.—*See* Letters Patent, 2.

Rent.—*See* Auction; Landlord and Tenant, 2, 4.

Residuary Legatee.—*See* Will, 6.

Restraint of Princes.—*See* Contract, 1.

Restriction as to Particular Trade.—*See* Landlord and Tenant, 3.

Resulting Trust.—*See* Statute of Frauds, 2.

Risk.—*See* Sale.

Rule in Shelley's Case.—*See* Trustee, 2.

Sale.

Plaintiffs, according to their custom, sold defendant sugar on these terms: "Prompt at one

month; goods at seller's risk for two months." "Prompt" meant on the Saturday after the expiration of one month. The sugar was in "fillings," *i. e.*, separate lots finished on different days, each filling consisting of about 300 "tytlers" or loaves. The sugar was to remain in the seller's warehouse two months, unless the buyer wished it sooner, in which case he sent orders for so much as he wished, and if it was not all delivered on the "prompt" day, an approximate sum was paid, and after the remaining sugar was weighed to ascertain the balance due. Plaintiffs had floating policies of insurance on their stock, including goods in the warehouse "sold and paid for, but not removed." Defendant had nothing to do with this insurance. More than two months after a sale of four fillings to defendant, part of which he had removed and paid for, leaving an unascertained balance to be weighed and removed, a fire consumed the warehouse and its contents. *Held*, that the loss fell on the buyer, and that he had no claim for any insurance. Cockburn, C. J., thought the property in the goods, though they were undelivered, had passed.—*Martineau et al.* v. *Kitching*, L. R., 7 Q. B. 436.

See Auction.

Scandalous Matter.

The statement that defendant is dealing with the shares which are the subject of controversy, for the purpose of "rigging the market," that is creating a fictitious value to them by pretended sales and purchases, is irrelevant, and hence scandalous in a bill which set forth that plaintiff was entitled to the shares, and that they had been placed in defendant's hands to dispose of as he should think fit, and praying for an injunction to restrain defendant from selling the same until plaintiff should be secured. —*Rubery* v. *Grant*, L. R. 13 Eq. 443.

Seal.—*See* Guarantee.

Separation Deed.—*See* Covenant.

Servant of the Crown.—*See* Mandamus.

Settlement.

P., a spendthrift, upon the suggestion of trustees made over a part of his property to them with power to invest the fund and pay the income to him or any child of his, during his life, and at his death to hold the fund in trust for any widow during her life, according to his appointment, and subject to her right, in trust for his child, if he had any, as he should appoint, and in default of appointment to any child who should attain twenty-one, and failing such child, in trust for a cousin's children. *Held*, that the settlement was not so unreasonable that the settlor could set it aside.—*Phillips* v. *Mullings*, L. R. Ch. 244.

Share in Profits.—*See* Partnership, 1.

Shareholder.—*See* Company 2, 4.

Shelley's Case, Rule in.—*See* Trustee, 2.

Shipment.—*See* Contract, 4.

Signature of Firm Name.—*See* Partnership.

Solicitor.

1. A client neglected to furnish funds for costs on application of his solicitor, and the latter declined to go on. Client thereupon obtained other solicitors, who applied to the former solicitor for the papers in the suit, agreeing to return them without prejudice to his lien for charges. *Held*, that the papers must be given up.—*Robins* v. *Goldingham*, L. R 13 Eq. 440.

2. A solicitor employed in a special case by a company required security for costs, and the company gave him a charge on debts due it. There was a directory clause in the Company's Act that such charge should be registered. *Held*, that the solicitor had no lien, as it was his business to see that the directions of th Act were carried out.—*In re Patent Bread Machinery Company*, L. R. 7 Ch. 289.

3. In 1863 a bill was filed in a friendly suit by the next friend of a minor beneficiary under a will, asking that a guardian be appointed for said minor and his brothers and sisters, for an order for allowance for maintenance and education, for proper accounts, and for a receiver of the income under said will. Action was taken on all these points, and one J. acted as solicitor, being employed by said next friend. In 1866, J., died. In 1867 said minor came of age, and soon after sold the real estate which had come to him under said will. In 1868 he had the receiver discharged, and changed his solicitors. The executrix of J. petitioned for a declaration that the real estate was subject to a lien for J.'s charges as solicitor on the ground that it was properly "preserved" by his skill. *Held*, that the proceedings were necessary, the solicitor duly employed, the action taken ratified by said minor coming of age, and that the lien was good.—*Baile* v. *Baile*, L. R., 13 Eq. 497.

4. A solicitor incurred costs in successfully defending a vessel in a suit against her. Afterwards various suits for necessaries were brought against the vessel, judgment was given against her, and the judge ordered her to be sold, and the proceeds brought into court. Some of the charges were for necessaries supplied before the institution of the first suit, and some after that time. On motion of the solicitor in the

first suit it was *held* that he was entitled to his costs out of the proceeds of the vessel in priority to all claims for necessaries supplied after the institution of that suit, but not to claims for necessaries supplied before that date.—*The Heinrich*, L. R. 3 Ad. & Ec. 505.

See Undue Influence.

Sovereign.—*See* Prerogative of Crown.

Specific Performance.—*See* Covenant.

Spendthrift.—*See* Settlement.

Stamp Act.—*See* Construction of Statute, 2.

Statute, Construction of.—*See* Construction of Statute.

Statute of Frauds.

1. D. had a verbal agreement with P. for the lease of a house for seven years. Afterwards D. wrote to P., stating certain conditions upon which he would take the house. P. replied, not agreeing to all the conditions. D. ultimately refused to take the house, and P. brought a bill for specific performance. *Held*, that the transaction was within the statute of frauds.—*Nesham* v. *Selby*, L. R. 7 ch. 406.

2. Plaintiff conveyed an estate to defendant by what purported to be an absolute deed. No money however was paid, and plaintiff denied that the conveyance was in trust. Defendant claimed that plaintiff made the conveyance through fear of creditors, and that he was to account for the rents until he paid the purchase-money or reconveyed the estate, and he set up the statute of frauds. *Held*, that if defendant chose to rely on "his own scoundrelism," he must aver it more distinctly, that the statute did not apply to protect fraud, that there was a resulting trust, and defendant must reconvey.—*Haigh* v. *Kaye*, L. R. 7 ch. 469.

See Contract, 2.

Statute of Limitations.

By a private Act of 2 & 3 Ph. & M. ch 23, estates were given to N. and others successively in tail male. On failure of all other limitations there was a final limitation to the crown. There was also a provision that no "act . . thereafter . . suffered" by any of the persons named, "or by any of the heirs male of their several bodies . . should . . put from entry . . any of the heirs in tail," or the crown. In 1781, a lease of said lands was made by the tenant in tail. Since the expiration of the lease in 1832, more than twenty years ago, defendant, and those whom he claimed through, had held the lands adversely. In an action by the heir in tail male, *held* (Bramwell, B., *dissentiente*), that plaintiff was not barred by the statute of limitations of 3 & 4 Wm. IV. ch. 27, under which a lapse of twenty years after a tenant in tail is dispossessed and has a right of entry, is a good defence in ejectment.—*Earl of Abergavenny* v. *Bruce*, L. R. 7 Ex. 145.

Statute of Perpetuities.—*See* Will, 10.

Street.—*See* Highway.

Surrender of Lease.—*See* Bankruptcy, 2.

Taxing Costs.—*See* Mandamus.

Tenant in Common.

A tenant in common of a farm entered on the land, put a lock on the entrance gate, cut the grass, made it into hay, and carried the hay away. *Held*, that the co-tenant could maintain neither trespass nor trover.—*Jacobs* v. *Seward*, L. R. 5 H. L. 464.

Tender.

Defendants gave notice that they had tendered in court a certain sum without costs of suit, but did not state the grounds upon which they claimed that plaintiff was not entitled to costs. *Held*, a bad tender.—*The Thracian*, L. R. 3 Ad. & Ec. 504.

Termini.—*See* Common Carrier.

Testamentary Intention.—*See* Will, 2.

Trade-Mark.

R. J. had a secret preparation which he called "R. J.'s Horse-Blister." R. J. J. learned the secret in the course of his employment, and after the death of R. J. began to manufacture what he called "R. J.'s Horse-Blister." *Held*, that he might do so, but could be enjoined from saying in his advertisements that the manufacture of R. J.'s regular successors was spurious, or that his own was the "only genuine."—*James* v. *James*, L. R. 13 Eq. 421.

Transfer of Shares.—*See* Company, 8; Descriptio Personarum.

Trespass.—*See* Tenant in Common.

Trover.—*See* Tenant in Common.

Trust.

A testator after making certain bequests, and disposing of the residue of his estate, continued: "I further will and desire that my executor do pay the trustees of" a charity "a further sum of £1,000 . . for the following use, that is, to pay the required amount" to keep his gravestone in repair, "yearly if required," and to give the balance to the said charity as he directed. *Held*, that though the sum needed for such repairs was uncertain, the gift to the charity was good, and the trust to make the repairs honorary merely.—*Hunter* v. *Bullock*, L. R. 14 Eq. 45.

See Construction, 1; Equity; Statute of Frauds, 2; Will, 4.

Trust for Sale.

Two tenants in common of freehold hereditaments conveyed to plaintiff in trust to sell or exchange for other real estate, and hold the proceeds to their use. Subsequently L. and S. made an agreement reciting the deed to plaintiff, and directing that plaintiff should allot the hereditaments enumerated in the first schedule annexed thereto to L. as his part, and those in the second schedule to S. for her part, and that plaintiff should continue to stand possessed of the property as trustee. In both instruments it was provided that the interest of S. should be held to her sole and separate use. S. married an alien, and died leaving a will, in which she gave her husband, *inter alia*, a life-interest in "all my landed property," describing the foregoing hereditaments. In a bill filed to carry out the trusts raised by the two deeds mentioned, *held*, that the second agreement put an end to the trust for sale, and the property must still be considered real estate; but even if the trust for sale still existed, S. by her will had elected to consider it real estate, and therefore the husband, being an alien, could not take under the will, the Naturalization Act of 1870 not being retrospective.—*Sharp* v. *St. Sauveur*, L. R. 7 ch. 343.

Trustee.

1. Trustees under a marriage settlement were authorized to invest in such real or personal securities as they should think fit. On a legal separation taking place, the trustees applied for directions as to a note of hand for the sum of £2,500, given by the wife to the husband before marriage. *Held*, that it might remain, on the husband's giving bonds for that amount with interest at five per cent.—*Pickard* v. *Anderson*, L. R. 13 Eq. 608.

2. Conveyance to B., his heirs and assigns, to the use of C. for life, then to the use of B., his heirs and assigns, upon trust to pay the income to M. for her life, and at her death B. to stand seized to such uses as M. should appoint, and in default of appointment, to the use of the heirs and assigns of M. for ever. *Held*, that the legal estate in fee was in B., and the equitable estate in fee was, by virtue of the rule in Shelley's case, in M. *Aliter* in case of a will.—*Cooper* v. *Kynock*, L. R. 7 Ch. 398.

3. A trustee reconveyed property of which he had a mortgage to the mortgagor, and appropriated the money to his own use. The mortgagor mortgaged the property to other parties, the trustee assisting him to conceal both the first mortgage and the conveyance back. *Held*, that the *cestuis que trust* had no priority over the second mortgagees. The same trustee took a conveyance in fee from his mortgagor, and, suppressing the mortgage made an abstract of title ending in himself, which was acceptable to the conveyancing counsel of the chancery court, and mortgaged the property to other trustees. *Held*, that having no notice they took a good legal title. *Pilcher* v. *Rawlins*, L. R. 7 Ch. 260.

4. Trustees held property in trust for E., wife of W., during his life, and on her death for W., and on his death, for such as she should appoint, and in default of appointment, for W., his executors and assigns. E. by will directed that W. should receive the income for life, subject to some annuities. One half of the principal she gave to W., and the other half she gave in legacies to be paid at his death. She made him executor. *Held*, that the trustees were justified in paying over the whole of the fund to W. at once.—*Hayes* v. *Oatley*, L. R. 14 Eq. 1.

See Bankruptcy, 3; Forfeiture, 1; Will, 4

Ultra Vires.

The directors of the N. Company (limited), were empowered "to enter into, alter, rescind, or abandon contracts in such manner as they should think fit." *Held*, that they acted within their powers in releasing their secretary, in consideration of his resigning his office, from an engagement to take 150 shares.—*In re Nanteos Consol Company*, L. R, 13 Eq. 437.

Umpire.—*See* Evidence, 4

Unauthorised Loan.—*See* Equity.

Undue Influence.

A father had a life-interest in certain property, reversion to his son. Part of the property came from the father's ancestor, and part from the mother's. The son, who lived with his father and step-mother, had a large income of his own. When twenty-one years old the son, without professional advice, made a deed giving his step-mother and her daughter the reversion in all of said reversionary property, and also giving the father a power to appoint as to that part coming from grantor's mother's side, to any third wife. The son lived five years more with his father, during which time he spoke, when in a passion, of setting the deed aside. He afterwards had solicitors, and the question of setting the deed aside was discussed with them, but the bill to set aside was not brought until nine years after he left his father's house. *Held*, that the circumstances and the nature of the deed were evidence enough of undue influence, but as through the unreasonable delay in bringing

the bill the step-mother and her daughter had reasonably expected to come into the income, only the power in the father to appoint to a third wife should be set aside.—*Turner* v. *Collins*, L. R. 7 Ch. 329.

Vendor and Purchaser.

1. Four years after a conveyance, grantee brought a bill praying that a certain reservation in the deed might be corrected on the ground of mistake. Grantor denied the mistake, and died before making oath to his denial. *Held*, that as in the opinion of the court there was mistake, grantee might have the deed corrected or set aside.—*Bloomer* v. *Spittle*, L. R. 15 Eq. 427.

2. F. made a contract with P. to sell him a leasehold estate, with a stipulation that the purchase-money should be paid at different times, and that the deeds should not be delivered till the money was all paid. P. paid part of the purchase-money, and with F.'s consent made a lease of the premises. P. afterwards deposited his contract from F. with a bank as security for a debt due the bank from him, and at the same time made an agreement in writing to make "a valid assignment of my contract with F. . . . by way of mortgage" for further security "upon request" of the bank. Notice of P.'s transaction with the bank was given F. by the bank, couched in the language of the above agreement, and F. acknowledged service thereof Two months after the time limited for the completion of the sale from F. to P., the latter paid the balance of purchase-money due, £10,000, and F. delivered the deeds of assignment to him. No notice was taken of the bank's claim. *Held*, that the agreement to assign to the bank upon request, amounted neither to an absolute assignment nor to an equitable mortgage, and that the notice to F. was insufficient to put him in the position of a trustee for the bank for the balance of the purchase money.—*Shaw* v. *Foster et al.*, L. R. 5 H. L. 321; s. c. L. R. 5 Ch. Ap. 604, *nom. McCreight* v. *Foster*.

See Auction; Contract, 4; Injunction, 3; Sale.

Vendor's Lien.—*See* Lien.

Verbal Agreement.—*See* Statute of Frauds, 1.

Vices du Sol.—*See* Liability of Builder.

View.—*See* Practice, 8.

Voluntary Deed.—*See* Deed.

Voluntary Settlement.—*See* Settlement.

Waiver.—*See* Landlord and Tenant, 1; Railway, 2.

War.—*See* Freight.

Waste, Impeachment of.—*See* Estate for Life.

Weekly Hiring.—*See* Contract, 2.

Wife.—*See* Evidence, 3.

Will.

1. Testator gave his real estate to one, and his personal to another. He had two shares in a navigation company, which was real estate; but some years before his death, by an Act of Parliament, the navigation company had been merged in a railway company, but testator had never either conveyed his navigation shares to the railway, or taken stock in the latter, though the Act gave the option. *Held*, that the shares were personal property.—*Cadman* v. *Cadman*, L. R. 13 Ev. 470.

2. About a year before his decease testator executed an instrument with due formality of a will, beginning: "I have given all that I have to" B. C., J. C., and H. C. One of the attesting witnesses was directed to take the paper to the trustee named "as soon as the breath was out of his (testator's) body." *Held*, a will, notwithstanding the words "have given," instead of "give."—*In the Goods of W. Coles*, L. R. 2 P. & D. 362.

3. A gift to a wife, "for the use and benefit of herself, and of all" testator's children, *held*, to make the wife and children joint tenants.—*Newill* v. *Newill*, L. R. 7 Ch. 253.

4. M. bequeathed a sum to trustees, to be applied "in aid of a Welsh church now in course of erection at A.," and the residue of her personal property "upon trust, to be by them applied in aid of erecting or endowing an additional church at A. aforesaid." There was a church at A., besides the Welsh church mentioned, and no immediate prospect of any other being built. *Held*, that the latter bequest was intended for any future church, and was not to be confined to any existing before testatrix's death, that the gift was not void under the Mortmain Act, but that it was doubtful whether the court would hold the fund indefinitely, or apply the doctine of *cy pres* to it, there being no reasonable prospect of carrying the purpose of the gift into execution.—*Swinnett* v. *Herbert*, L. R. 7 Ch. 232.

5. If a trustee named in a will is not required either expressly or by necessary inference to pay the debts of the estate, the court will not appoint him executor.—*In the Goods of Punchard*, L. R. 2 P. & D. 369.

6. A testator gave property to trustees in trust for his children, born or *en ventre sa mere* at his death; failing that trust, to such of his two brothers as should be living at the time of the said failure of said trust "ascertained." He left a widow, but no children were ever

born to them either before or after his death. *Held*, that the trust failed immediately upon his death, and that "ascertained" meant "made certain."—*Sidebottom* v. *Sidebottom*, L. R. 2 P. & D. 365.

7. T. gave property by will to trustees, to pay the income to S., until M. should become twenty-one, or until she should marry under that age with consent of her guardians, then to pay the income to M. He also gave a sum absolutely to M., and at the end of his will spoke of what he had done for her as his "provision" for her. M. had reached advanced years unmarried. *Held*, that she took a life-interest, subject to modification in the future if she should marry.—*Savage* v. *Tyers*, L. R. 7 Ch. 536.

8. In the blanks of a printed form of a will, the testatrix had written some words partly in ink and partly in pencil. The words in ink, taken in connection with the printed part, made sense; some of the words in pencil were under those in ink, and some were partially rubbed out. The witnesses did not see the paper when they signed. *Held*, that the printed part, and the words in ink, should be admitted as the will.—*In the Goods of Adams*, L. R. 2 P. & D. 367.

9. By the Indian Succession Act, no man having a nephew or niece, or any nearer relative, can give any property to a charity, by a will made twelve months before his death. By said act, immovable property in India follows the law of the place, movable property the law of the domicile. Testator having his domicile in Scotland, gave by will, duly executed, all his property, consisting of real and personal estate, to executors to turn into money, and to pay over the money to trustees in Scotland. The latter he directed to apply the said sum to a charitable purpose. He died within a few days of the date of the will, leaving sisters. There was more than the amount given to the charity of each kind of property in India. In the Scotch law, the English rule against marshalling assets in favour of a charity does not obtain. *Held*, that the whole sum devoted to the charity might be paid out of the Indian movable property.—*Macdonald* v. *Macdonald*, L. R. 14 Eq. 60.

10. A testator created certain limitations and entails, and on their failure directed the property to be paid to the children (except J. G.) of A. then living, and the issue of such of them as should be then dead leaving issue, and the issue of J. G.; the issue of A. to have no greater share than their, his, or her parents would have had, if living; and the issue of J. G. no greater share than the issue of the children of A. would have had in case of the decease of their, his, or her parents. At the end of the will there was a clause, "to prevent all doubts," to the effect that if the money should ever come to the issue of A., or the issue of J. G., or any of them, and any of them should be dead, having left issue, the issue of such issue so dead should have the share which their, his, or her parent would have been entitled to, if living. *Held*, that the "issue" of A.'s grandchildren meant children; that the children of a grandchild of A., which grandchild died before the making of the will, were entitled to the share their parent would have taken, had he been alive at the time of division; and that the clause at the end of the will was not void as being too remote.—*Heasman* v. *Pearse*, L. R. 7 Ch. 275.

See Construction, 1–3; Estate for Life; Forfeiture, 1, 2; Hotchpot; Legacy, 1-3.

Witness.—*See* Evidence, 3.

Words.

"*Children*."—*See* Will, 10.

"*Control*."—*See* Railway, 1.

"*Gentleman*."—*See* Description Personarum.

"*Have Given*."—*See* Will, 2.

"*Issue*."—*See* Will. 10.

"*Provision*."—*See* Will, 7.

"*Rigging the Market*."—*See* Scandalous Matter.

Writ of Prohibition.—*See* Jurisdiction.

Written Contract.—*See* Contract, 2.

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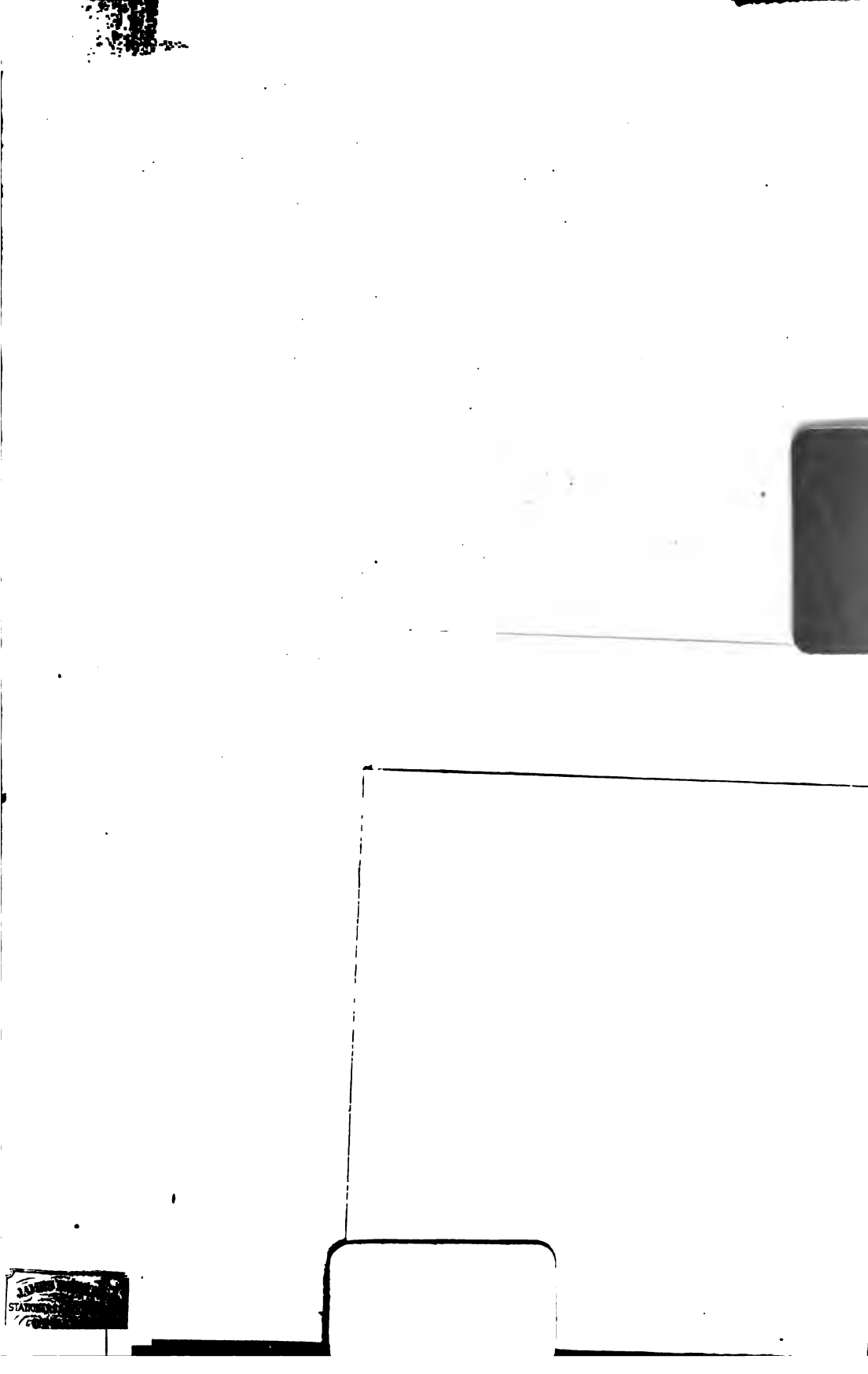
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